

THIS DISPOSITION IS NOT CITABLE  
AS PRECEDENT OF THE TTAB

Mailed: September 4, 2002

Paper No. 14  
ejs

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re MS Artist Products, Inc.

---

Serial No. 75/923,574

---

Charles H. Knull of Graham, Campaign P.C. for MS Artist Products, Inc.

Carolyn Pendleton Cataldo, Trademark Examining Attorney,  
Law Office 103 (Michael Hamilton, Managing Attorney).

---

Before Seeherman, Hairston and Rogers, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

MS Artist Products, Inc., a Japanese corporation, has appealed from the final refusal of the Trademark Examining Attorney to register DREAMS COME TRUE for the following goods and services:

Series of pre-recorded phonograph records, audio tapes, video tapes and CDs featuring music (Class 9);

Posters, unmounted photographs and  
paper featuring coasters (Class 16);  
and

Entertainment, namely live performance  
by a musical group (Class 41).<sup>1</sup>

Registration has been refused pursuant to Section 2(d)  
of the Trademark Act, 15 U.S.C. 1052(d), on the ground that  
applicant's mark so resembles the mark DREAMS COME TRUE  
PRODUCTIONS, with the word PRODUCTIONS disclaimed,  
previously registered for "production and distribution of  
documentaries, fiction and non-fiction children's videos"<sup>2</sup>  
that, as used on or in connection with applicant's  
identified goods and services, it is likely to cause  
confusion or mistake or to deceive.

The appeal has been fully briefed; an oral hearing was  
not requested.

We affirm the refusal of registration with respect to  
the goods in Class 9.<sup>3</sup>

---

<sup>1</sup> Application Serial No. 75/923,574, filed February 22, 2000,  
and asserting first use and first use in commerce on July 27,  
1998.

<sup>2</sup> Registration No. 2,050,026, issued April 1, 1997; Section 8  
affidavit accepted.

<sup>3</sup> It is unclear whether the Examining Attorney has refused  
registration with respect to applicant's goods in Class 16  
(posters, unmounted photographs and paper featuring coasters).  
In the final Office action, in her discussion of the relatedness  
of applicant's and the registrant's goods and services, she  
stated only that "the goods and services are related because many  
entities that produce records, compact discs, videotapes and/or  
audiotapes are also involved with the production and distribution

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

Turning first to the question of likelihood of confusion with respect to applicant's Class 9 goods, we note that, although applicant and the Examining Attorney have discussed the registrant's services as though they were goods (see, for example, page 3 of applicant's brief, in which it refers to the "ultimate consumer of the products from Dreams Come True Productions"), the cited registration is actually for the service of "production and

---

of videos, television shows, theatrical performances and other entertainment." Nor did she make any mention of applicant's Class 16 goods in the January 22, 2002 Office action denying applicant's request for reconsideration. Although the Examining Attorney, in her appeal brief, listed all the goods and services in applicant's application, including those in Class 16, she did not discuss how the Class 16 goods might be related to the registrant's services. In any event, to the extent that the refusal was intended to extend to the goods in Class 16, we find that the record is not sufficient to establish that these goods and the registrant's services are related, and consequently we find that the Office has not met its burden in demonstrating likelihood of confusion with respect to the goods in Class 16.

distribution of documentaries, fiction and non-fiction children's videos." It is not clear to us that the general public, which would be the ultimate customers for applicant's goods, would be the customers for the registrant's identified production and distribution services. In other words, based on this record, we cannot find that the general public would come in contact with the registrant's services, and therefore we cannot find that confusion is likely with respect to this audience.

On the other hand, it is clear that the registrant's production and distribution services would be directed to stores which sell and rent video cassettes, or to stores which sell records and audio and video cassettes, and these stores would also be the class of customers for applicant's Class 9 goods. In this connection, the Examining Attorney has made of record material from a company identified as Tower Records.Com which shows that this company sells compact discs and children's videos and compact discs.

To find a likelihood of confusion, it is not necessary that the goods and/or services of the parties be similar or competitive, or even that they move in the same channels of trade. It is sufficient that the respective goods and services are related in some manner, and/or that the conditions and activities surrounding the marketing of the

goods and services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See **In re International Telephone & Telegraph Corp.**, 197 USPQ 910 (TTAB 1978).

The relationship between video tapes featuring music and the production and distribution of children's videos is obvious, so obvious, in fact, that, as noted above, the applicant has essentially treated the registrant's services as though they were the children's videos themselves. In addition, the Examining Attorney has submitted evidence of the relatedness of applicant's Class 9 goods and the registrant's services. In particular, the Examining Attorney has made of record third-party registrations which show that a single entity has registered the same mark for audio and video tapes and cassettes, on the one hand, and production and distribution services, on the other hand. See, for example, Registration No. 2,071,419 for, inter alia, the production of videotapes and sound recordings; and videotapes, videocassettes, and sound recordings including phonograph records, audio tapes, and compact discs; Registration No. 2,364,946 for, inter alia, audio cassettes, video cassettes, and compact discs featuring

**Ser No.** 75/923,574

music, documentaries and entertainment; and production and distribution for others of motion pictures and television programs; Registration No. 2,403,679 for, inter alia, audio and video tapes and cassettes and audio and video compact discs featuring music, videos and movies; motion picture film production; and radio and television entertainment production in the field of variety and music. 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. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

Those involved in the retail sale of audio and video cassettes and tapes will be aware that the same companies may offer the service of producing and distributing audio and video cassettes and tapes, as well as offering the cassettes and tapes themselves.

Applicant has argued that the identified goods and services are different because the registrant's services involve children's videos. However, the identification in applicant's application of "pre-recorded phonograph records, audio tapes, video tapes and CDs featuring music" is broad enough to include records, audio tapes, video tapes and compact discs for children. The fact that

applicant's products feature music certainly does not preclude them from being offered to children; it is common knowledge that many audio and video products for children contain or feature music. For example, the Tower Records.Com material submitted by the Examining Attorney include, in a search of children's music, "Christmas Sing-A-Longs" by the Do-Re-Mi Children's Chorus and, in a search of children's videos, "Raffi—A Young Children's Concert With Raffi."

Applicant's arguments regarding the subject matter of its cassettes, videos, etc. are also to no avail. Applicant asserts that its goods feature new age pop music. However, there is no such limitation in the identification of goods and, as applicant itself has acknowledged, the issue of likelihood of confusion must be resolved on the basis of the goods as they are identified in the application and the cited registration. For the same reason, applicant's argument that the packaging for its recordings reflects that the group DREAMS COME TRUE is Japanese-based and such packaging often carries Japanese characters is not persuasive.

Turning next to the marks, they convey the same commercial impression. Applicant's mark is DREAMS COME TRUE; the cited mark is DREAMS COME TRUE PRODUCTIONS.

Obviously, the only difference between the marks is that the registrant's mark contains the word PRODUCTIONS, and this difference is insufficient to distinguish the marks. The descriptive word PRODUCTIONS, which has been disclaimed, has little source-indicating capacity; it is the words DREAMS COME TRUE that people will look to as indicating the source of the registrant's services. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties). Even if the relevant consumers for applicant's goods and the registrant's services notice the presence or absence of the word PRODUCTIONS in the respective marks, they are likely to attribute this to the differences in the goods and services, i.e., that PRODUCTIONS is used by the company for its production services because it describes them, but it is not used for the cassettes and tapes themselves. Thus, DREAMS COME TRUE and DREAMS COME TRUE PRODUCTIONS will be seen as variant marks indicating origin in a single source.

We recognize that the relevant class of consumers for applicant's goods and the registrant's services must be

considered sophisticated. However, the marks are so similar that, as discussed above, even careful and sophisticated purchasers are likely to view them as indicating a single source. Moreover, sophisticated purchasers are more likely to be aware of the relationship between the production and distribution of children's videos and video and audio cassettes and tapes and compact discs. Accordingly, we find that applicant's Class 9 goods are likely to cause confusion with the registrant's services.

This brings us to the refusal of the Class 41 services, which are identified as "entertainment, namely live performance by a musical group." The Examining Attorney has submitted third-party registrations to show the relatedness of these services with those of the registrant. However, a close review of these registrations does not indicate that any are for the production and distribution of videos. Nor do the excerpts of articles retrieved from the NEXIS data base which were submitted by the Examining Attorney demonstrate that the services are related. Many of these stories simply contain the words "record" or "music" or "produced," but do not show that companies which produce videos also offer live performances under the same mark. Thus, the Office has not met its

**Ser No.** 75/923,574

burden of demonstrating the requisite relatedness between applicant's services and those of the registrant, and we therefore cannot find likelihood of confusion with respect to the services in Class 41. This is not to say, however, that on a different record we would not reach a different result.

Decision: The refusal of registration is affirmed as to the goods in Class 9, and reversed with respect to the goods and services in Classes 16 and 41.