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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re KidVid, Inc.

Serial No. 75/875,134

Lee B. Beitchman for KidVid, Inc.

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Office 112 (Janice O'Lear, Managing Attorney).

Before Cissel, Seeherman and Quinn, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

KidVid, Inc. has appealed from the final refusal of
the Trademark Examining Attorney to register LITTLE
LINGUIST, with the word LINGUIST disclaimed, for
"prerecorded video tapes, audio cassettes, compact discs,
and digital video discs containing materials intended to
develop and/or improve the creative and intellectual

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faculties of infants and children."¹ 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 LITTLE LINGUIST, previously registered for "computer hardware, computer peripheral and computer software for speech and language acquisition" in Class 9 and "children's multiple activity toys" in Class 28² that, if it is used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed appeal briefs. An oral hearing was not requested.

We affirm the refusal of registration.

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

¹ Application Serial No. 75/875,134, filed December 28, 1999, asserting a bona fide intention to use the mark in commerce. Applicant had submitted a disclaimer of LITTLE in the original application. The Examining Attorney advised applicant that such disclaimer would not be printed, but that a disclaimer of the descriptive term LINGUIST was required. Applicant subsequently submitted a disclaimer of this word.

² Registration No. 2,423,716, issued January 23, 2001.

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the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the marks, they are identical in appearance and pronunciation. We also find that they are identical in connotation, in that both suggest that they will help the user of the respective goods to become a "little linguist", i.e., that the child user will develop or improve his or her language skills. In this connection, we note that applicant has not only acknowledged that LINGUIST describes its goods by its compliance with the Examining Attorney's requirement that it disclaim the term, but applicant has stated that its video specifically teaches "basis words in multiple languages to infants and children." Response filed October 10, 2000. Although there are specific differences in the goods, applicant's goods and the registrant's Class 9 goods have a similar purpose, and therefore the connotation of the marks is the same. Thus, this case differs from those cited by applicant in which the marks were found to have different connotations because of the respective goods with which they were used, e.g., **In re British Bulldog, Ltd.**, 224 USPQ 854 (TTAB 1984) (PLAYERS for shoes and PLAYERS for underwear); **In re Sears, Roebuck and Co.**, 2 USPQ2d 1312

(TTAB 1987) (CROSS-OVER for bras and CROSSOVER for ladies' sportswear).³

This brings us to a consideration of the goods, specifically whether applicant's identified goods are sufficiently related to the registrant's Class 9 goods such that, when identical marks are used with them, confusion is likely.⁴ Applicant has attempted to distinguish the goods by stating that the registrant's goods are "sophisticated 'computer hardware, peripherals and software for speech and language acquisition' bought by schools, audiologists, teachers and parents who need a very real mechanism for improvement of these skills." Brief, p. 3. Applicant asserts that it, on the other hand, "is a producer and manufacturer of numerous video tapes all designed to stimulate very young children, but done using baby faces,

³ Applicant listed certain third-party registered marks in its request for reconsideration and referred to them again in its appeal brief. A mere listing of registrations is insufficient to make them of record. **In re Duofold Inc.**, 184 USPQ 638 (TTAB 1974). In any event, we are not privy to the information that may have led to the issuance of these registrations, nor is the Board bound by decisions of Examining Attorneys in examining other applications. **In re Nett Designs Inc.**, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001)

⁴ Applicant has focused on the Class 9 goods of the cited registration in arguing against likelihood of confusion. Although the Examining Attorney has discussed the registrant's Class 28 goods in her brief, the references seem to be for the purpose of bolstering assertions made in connection with likelihood of confusion between applicant's goods and the registrant's Class 9 goods. Accordingly, we have confined our consideration to whether applicant's mark is likely to cause confusion with the cited registration in Class 9.

toys and animation, and not requiring the infant to perform any responsive action." Brief, p. 4.

The difficulty with applicant's argument is that it has failed to consider the well-established rule that the question of likelihood of confusion must be determined on the basis of an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited] registration, rather than what the evidence shows the goods and/or services to be. **Canadian Imperial Bank of Commerce v. Wells Fargo Bank, NA**, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); **In re William Hodges & Co., Inc.**, 190 USPQ 47 (TTAB 1976). The goods identified in the cited registration are computer hardware and software for speech and language acquisition. Such goods are not limited to use by professionals, nor are they necessarily sophisticated equipment. The computer software, as identified, could employ the animation and entertaining learning techniques that applicant uses.

Moreover, the goods must be deemed to be bought by the same class of purchasers and to appeal, at least in part, to the same audience. Applicant's goods are specifically identified as improving the creative and intellectual faculties of infants and children; the registrant's

identification contains no limitation as to the users of its goods, and therefore would encompass computer software for speech and language acquisition in children. Further, it would appear from the very term "speech acquisition" that this software would be used by young children, which is the same audience that applicant targets. Thus, parents would be the normal purchasers of both applicant's and the registrant's identified goods.

Applicant argues that "the goods and services are not confusingly similar because Registrant's goods are computer programs requiring interactivity for the child to learn and applicant's goods are passive audio and video recordings designed to familiarize infants and children with various words." Request for reconsideration, filed August 9, 2002. Although applicant's goods are specifically different from the goods identified in the cited registration,⁵ the question is whether consumers are likely to confuse the

⁵ The Examining Attorney has argued that the "compact discs" in applicant's identification are legally the same as the registrant's computer software because computer software is frequently embodied in compact discs. We do not accept this rather strained interpretation of applicant's identification, which is for "prerecorded video tapes, audio cassettes, compact discs, and digital video discs" (emphasis added). It appears to us that a fair reading of this identification is that applicant's compact discs are similar to prerecorded audio cassettes, but the material is presented on a disc instead of a tape. Further, although computer software may be presented on a compact disc, "computer software" is a different item from "compact discs."

source of the goods, not the goods themselves. It is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods 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. **In re International Telephone & Telegraph Corp.**, 197 USPQ 910, 911 (TTAB 1978).

In this case, there is an obvious relationship between applicant's video tapes, audio cassettes, compact discs and video discs, and the registrant's computer software, in that both are used for a similar purpose, enhancing speech and language skills. Moreover, there is some evidence that these are the kinds of goods that may both be sold by an entity under a single mark. In this connection, the Examining Attorney has made of record a few third-party registrations for, inter alia, computer software and audio and video tapes used to teach speech and language. See, for example, Registration Nos. 2,492,191 and 2,499,612. 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).⁶

Applicant argues that the goods are sold in different channels of trade, stating that its videotapes are sold in stores such as Toys-R-Us and FAO Schwartz, and mass market discount stores,⁷ and that it is unlikely that the registrant's goods would be found in such stores. Again, applicant's argument is based on the channels of trade in which its own goods are sold or intended to be sold, and what it believes to be registrant's channels of trade. However, applicant ignores the previously stated principle that likelihood of confusion must be determined based on the identifications of the goods in the application and cited registration. Thus, where the goods in a cited registration are broadly described and there are no limitations in the identification of goods as to their channels of trade or classes of purchasers, it is presumed

⁶ The Examining Attorney has also made of record some third-party applications. Applications have no probative value other than to show that they were filed; thus, they have not been considered as evidence of the relatedness of the goods at issue.

⁷ Applicant's application is based on an intention to use the mark, not on use in commerce, and there is nothing of record to show that applicant has actually begun using the mark. Rather, applicant's comments about use appear to refer to its products which are sold under other marks.

that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers. **In re Elbaum**, 211 USPQ 639, 640 (TTAB 1981). Further, although the Examining Attorney has failed to submit any evidence that goods of the type identified in the application and the cited registration are sold in the same channels of trade, it is common knowledge that video tapes, audio cassettes, and computer software on subject matter directed to children are sold, inter alia, in children's toy stores.

However, even if we were to assume that the respective goods, as identified, were not sold in the same stores, they would still be encountered and purchased by the same class of purchasers. Parents may well wish to buy both computer software and audio and video tapes and compact discs to help their children develop speech and language skills. Parents who are familiar with the registrant's LITTLE LINGUIST computer software for speech and language acquisition are likely, upon seeing the identical mark LITTLE LINGUIST on "prerecorded video tapes, audio cassettes, compact discs and digital video discs containing materials intended to develop and/or improve the creative and intellectual faculties of infants and children," to assume that the goods emanate from the same source.

Applicant also asserts that the prices of the respective products differ, with applicant's audio and video tapes selling for \$14.95 and the registrant's computer hardware retailing for \$69.95 and its software being priced at \$19.95. Applicant argues, as a result, "that consumers who are likely to buy registrant's products are sophisticated individuals who would be expected to exercise greater care in making purchasing decisions," response filed December 31, 2001, and that price "is a determinative factor and should be used to further refute any confusion between the two products. A consumer would hardly expect to acquire the same product for such a wide price disparity of \$45.00 to \$50.00." Brief, p. 7. With respect to the latter point, again, the question is not whether consumers will confuse the goods, but whether they are likely to confuse the source of the goods. Further, even accepting applicant's statements regarding the prices for the respective goods, these statements show that registrant's software is sold for almost the same price as applicant's video and audio tapes, and that the prices for all the products are under twenty dollars. These relatively low prices are not likely to engender the great purchasing care that applicant asserts. Moreover, because the marks are identical, even a careful purchaser will not

be able to distinguish between applicant's trademark and the registrant's.

Finally, applicant argues that it has a family of marks because it has filed applications for other "LITTLE" marks, including LITTLE MUSICIAN and LITTLE ARTIST.⁸ Applicant has not submitted any evidence that it has promoted the marks together in such a way as to create a family of marks and, indeed, the Examining Attorney has pointed out that the applications are based on an intent to use the marks, and that Statements of Use have not yet been filed. More importantly, an applicant cannot rely on a family of marks argument to support the registration of a mark which is likely to cause confusion with a previously used or registered mark. See **Baroid Drilling Fluids Inc. v. Sun Drilling Products**, 24 USPQ2d 1048 (TTAB 1992).

Decision: The refusal of registration is affirmed.

⁸ Applicant mentioned these applications for the first time in its brief, and therefore they were not properly made of record. However, the Examining Attorney discussed the applications in her brief, so we deem them to have been stipulated into the record.