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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Curriculum Associates, Inc.

Serial No. 76329978

Charles Hieken of Fish and Richardson for Curriculum Associates, Inc.

Martha L. Fromm, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Quinn, Walters and Drost, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Curriculum Associates, Inc. has filed an application to register the mark QUICK-STUDY on the Principal Register for "printed educational materials for assisting students to learn elementary school subjects, namely, mathematics, reading, vocabulary, science and social studies," in International Class 16.¹

¹ Serial No. 76329978, filed October 23, 2001, based on use in commerce, alleging first use and use in commerce as of December 1989.

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark shown below, previously registered for printed reference charts on a variety of college subjects,² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

QUICK STUDY

Additionally, the Examining Attorney's final refusal is based on her requirement that applicant submit a substitute specimen on the ground that the mark on the drawing page differs from that on the specimen of use.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

Requirement for New Drawing or Substitute Specimen

The mark as it appears at the top of the cover page of a booklet that was submitted as the specimen of use is shown below:

² Registration No. 1,868,263 issued December 20, 1994, to BarCharts, Inc., in International Class 16. [Sections 8 (6 yr.) and 15 affidavits accepted and acknowledged, respectively.]

A Quick-Study™ Program

Test Ready™

Mathematics

- *Reviews Key Math Concepts* • *Develops Achievement Test-Taking Skills* •
- *Improves Math Test Scores* •

The Examining Attorney contends that the mark in the application, QUICK-STUDY, is a mutilation of the mark, A QUICK-STUDY PROGRAM, as it is shown on the specimen of record; and that A QUICK-STUDY PROGRAM creates a single commercial impression because it appears inside a rectangle on the same line and in the same font style and size.

Applicant contends that the word PROGRAM is merely descriptive in connection with the goods and therefore it is not part of the mark; rather, the mark is displayed in front of the descriptive term. Applicant further notes the use of the "TM" following the term QUICK-STUDY as evidence that the word PROGRAM is not part of its mark.

The issue before us is whether QUICK-STUDY, applicant's mark in the drawing of record, comprises a separate and distinct trademark as it appears in the specimens of record. Trademark Rule 2.51(a), shown below, establishes the requirement for a drawing in an application:

§2.51 Drawing required.

(a) In an application under section 1(a) of the Act, the drawing of the mark must be a substantially exact representation of the mark as used on or in connection with the goods and/or services.

It is well settled that an applicant may apply to register any element of a composite mark if that element presents a separate and distinct commercial impression as a mark; that is, the element in and of itself functions as a mark since, as shown by the manner of its use on the specimens, it creates a separate impression which is indicative of the source of the applicant's goods or services and distinguishes such from those of others. See, e.g., *Institut National des Appellations D'Origine v. Vintners International Co., Inc.*, 958 F.2d 1574, 22 USPQ2d 1190, 1197 (Fed. Cir. 1992), citing *In re Servel, Inc.*, 181 F.2d 192, 85 USPQ 257 (CCPA 1950); *In re Berg Electronics, Inc.*, 163 USPQ 487 (TTAB 1969); *In re Tekelec-Airtronic*, 188 USPQ 694 (TTAB 1975); and *In re Lear Siegler, Inc.*, 190 USPQ 317 (TTAB 1976).

On the specimens of record, QUICK-STUDY stands out in the phrase A QUICK-STUDY PROGRAM both because it is hyphenated and because the additional wording is highly descriptive, if not generic. Additionally, applicant's intent for QUICK-STUDY to function as a separate trademark

is apparent in the specimen because of the use of the "TM."³ Therefore, we resolve this question in favor of applicant and conclude that the requirement that applicant submit a substitute specimen showing use of the mark QUICK-STUDY alone is improper.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 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); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

³ The use of a "TM" would not lead us to conclude that a non-separable element of a mark was registrable. However, in this case, it supports our conclusion that QUICK-STUDY is a distinct trademark.

The Examining Attorney contends that the marks are essentially identical; and that the goods are closely related. Regarding the goods, the Examining Attorney contends that both applicant's and registrant's goods are printed materials used in education; that applicant's broadly identified goods encompass the goods identified in the registration; and that the mere fact that applicant's goods are for the elementary school level and registrant's goods are for the college level does not effectively distinguish the goods.

Applicant contends that the goods are quite different and that the class of purchasers of the goods is different, alleging that its goods are purchased by adults assisting elementary school children, while registrant's goods are purchased by college students.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average

purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Both marks consist of the words QUICK and STUDY in the same order. The stylization of the font in which the registered mark appears is of extremely limited impact,⁴ as is the hyphen separating the words in applicant's mark. Thus, the marks are essentially identical in overall commercial impression, and applicant does not argue otherwise.

Because the marks are virtually identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." *In re Shell Oil Co.*, 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). See also *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001).

Therefore, we now consider the goods involved in this case and we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*,

⁴ 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.")

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811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

In this case, both products are printed educational materials. There are numerous circumstances where the same purchaser would purchase educational materials for both elementary school subjects and college subjects, for example, college students who are also either tutors, student teachers or parents. Thus, we conclude that the goods are closely related, the channels of trade are likely

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to be the same, and the classes of purchasers are, at least, overlapping.

Therefore, we conclude that in view of the essentially identical commercial impressions of applicant's mark, QUICK-STUDY, and registrant's stylized mark, QUICK STUDY, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The requirement for a substitute specimen is reversed. The refusal under Section 2(d) of the Act is affirmed.