

Refusal under Section 2(d).

The examining attorney has refused registration under Section 2(d) on grounds of likelihood of confusion, citing the mark EXPLORE, held by Educational Ideas, Inc. Applicant respectfully requests that the examining attorney withdraw his refusal. The goods in the cited registration are very different in nature from the goods and services for which applicant wishes to register its mark, and many commercial factors render confusion as to source highly unlikely.

A. The Goods and Services are Different in Nature.

The cited mark is registered in two classes, for:

pre-recorded compact discs, and audio cassettes, sold to educators as part of a set pre-approved for classroom use in teaching in accordance with state approved curricula, all featuring language proficiency testing and instruction in language and speech, in Class 9; and

printed instructional, educational and teach materials sold to educators as a set pre-approved for classroom use in teaching in accordance with state approved curricula, namely, teachers manuals, student workbooks, printed tests and wall charts, all pertaining to language proficiency testing and instructions in language and speech, in Class 16.

These goods and services are specifically identified as being intended for use by a very specific and **government regulated** market. The goods are intended for sale to **educators**, which means licensed teachers, schools and schools districts. The goods are intended solely for use in **classrooms**, the plain meaning of which is in formal education at school. The goods are also **pre-approved** for teaching **in accordance with state approved curricula**. This description is a reference to federal legal mandates implemented through the United States Department of Education, that require the states to create and implement compliance with mandatory educational standards and testing to those standards as a condition for receiving federal funds. 20 U.S.C. Section 6301 et. seq. These mandates are intended to cause "standards-based educational reform." See 20 U.S.C. Section 6311(a)(1) et seq.

The educational subjects that must be covered in the standards and taught in the schools are mathematics, reading, and language arts, and, commencing the 2005-6 school year, science as well. 20 U.S.C. Section 6311(b)(1)(C). Registrant is producing items that assist in complying with state standards in just one of the four mandatory subject fields, **language arts**.

Standards-based educational reform has evolved over the last two decades, starting with an educational summit between the executive branch of the federal government and of each of the fifty states which resulted in the establishment by Congress, during the 1990s, of national education goals to be reached by the year 2000. The No Child Left Behind Act of 2001 is the most recent federal legislation, which requires states to develop testing in basic skills, language arts and mathematics, to be given to all students in certain grades, as a condition of receiving federal funding. See, for example, at wikipedia, [http://en.wikipedia.org/wiki/Standards-based\\_education\\_reform](http://en.wikipedia.org/wiki/Standards-based_education_reform) and [http://en.wikipedia.org/wiki/No\\_Child\\_Left\\_Behind\\_Act](http://en.wikipedia.org/wiki/No_Child_Left_Behind_Act).

The US Department of Education has published a reference book explaining standards-based educational system, at [www.ed.gov/admins/lead/account/nclbreference/reference.pdf](http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf). That references is incorporated by reference as though fully set forth herein.

Because the federal legislation makes federal funding contingent upon a state's adoption of compliant educational standards, virtually all states have adopted educational standards and testing. Links to the various state mandated educational standards are available at: <http://www.educationworld.com/standards/state/index.shtml>. As a result, products such as those offered by registrant have been developed that, when used in the classroom, will assure that the instruction provided covers all the material that the students will need to know in order to pass that state's standards-based testing.

Applicant, on the other hand, has applied to register this mark for a series of Class 9 items featuring entertainment and educational topics relating to history, culture, wildlife, nature, exploration and adventure, and Class 41 television programming and motion picture services identified as news stories, music, comedy, drama, science, natural history, natural science, geography, the environment, geology, anthropology, zoology, botany, social studies, history, world cultures, and games. Note that Applicant's fairly broad listing of topics does not include any subjects relating to language proficiency testing and instruction, or language and speech, the subjects of registrant's goods. Because the goods and services of applicant and the goods

of registrant are so different in nature, it is unlikely that confusion would arise from concurrent use of the two different marks at issue.

B. Different Target Customers

Production of television programming is a highly technical service that most consumers know little about, because they are not the customers for such services. The applicant's distribution customers are televisions and cable television systems: industry professionals that are essentially invisible to the typical consumer. They make decisions and engage in business transactions that ultimately have an impact on what entertainment is available to consumers. But there is no overlap between applicant's customers, namely, television programming distributors, and registrant's customers, namely, professional educators, which include schools and school districts as well as teachers, seeking to comply with state-mandated educational laws.

Because the customers for the two types of service are so different in nature, it is very unlikely that the services of one party will be offered to the customers of the other party. Accordingly, it is unlikely that the opportunity for confusion would ever arise.

C. Different Conditions of Sale or Purchase.

The nature of registrant's products require it to identify schools and school districts in need of its product, and then deal with the very complex purchasing and bidding requirements of public schools and school districts. By contrast, the customers of applicant's Class 41 services are highly involved in the provision and selection of the services, which constitute a completely different equally complex business transaction. The distribution customers (television and cable television systems) closely analyze the programming available, consider whether it fits their business model, and develop their own plans to market the distributed matter onward to their own customers. Similarly, applicant's production services are provided to industry insiders for whom the selection of the services is a major business transaction. They purchase the applicant's services not for entertainment purposes, but for their own business purposes. There is virtually no point of similarity between this experience of selection and purchase of television cable programming, and an educator's selection and purchasing of language arts educational materials in order to comply with state-mandated educational standards.

D. Conclusion.

The respective marks are applied to goods and services that are extremely different in nature and are marketed to completely different classes of customers, such that it is highly unlikely that customers would have the opportunity to be exposed to both marks and experience confusion. For all of the foregoing reasons, confusion as to source is not likely due to the many commercial factors that create distance and distinctions between the marks and the services. Accordingly, applicant respectfully requests that the examining attorney withdraw his refusal under Section 2(d).

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