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Trademarks/Likelihood of Confusion

Microsoft's 'Kin,' 'Kinect' Do Not Create Confusion With 'Kinbox,' 'Munchkinbox'

■ **Case Summary:** A federal district court grants summary judgment in favor of Microsoft on a developer's claim that the software giant infringed its mark.

■ **Key Takeaway:** The Microsoft Kin phones and Kinect accessory for the Xbox 360 are not likely to be confused with a Facebook-based social networking application.

Microsoft Corp.'s use of the term "kin" for its Kin mobile phones and Kinect video game sensor is not likely to create confusion with a small software developer's Kinbox social media application made for use on Facebook, the U.S. District Court for the Eastern District of Pennsylvania ruled Jan. 25 (*Kinbook LLC v. Microsoft Corp.*, E.D. Pa., No. 2:10-cv-04828-GP, 1/25/12).

Granting summary judgment in favor of Microsoft, the court found that the likelihood of confusion factors as set forth by the U.S. Court of Appeals for the Third Circuit overwhelmingly weighed in Microsoft's favor.

Small Developer Creates Facebook Application. Kinbook LLC of Rehoboth Beach, Del., is a software developer specializing in social networking applications. In 2009, it developed a software application for use on the popular Facebook social networking platform aimed at facilitating communications between family members. In connection with these applications, Kinbook sought to register the terms "Kinbox" and "Munchkinbox" with the Patent and Trademark Office.

In 2010, software giant Microsoft Corp. submitted an application to register the term "Kin" with respect to online services for mobile telephone and mobile media device users.

Microsoft released a line of smartphones under the names "Kin One" and "Kin Two" and also began marketing a controller-free motion-sensing acces-

sory for its Xbox 360 game console under the name "Kinect."

Kinbook sued Microsoft, alleging unfair competition and trade dress infringement under 15 U.S.C. § 1125(a).



Microsoft moved for summary judgment, arguing that as a matter of law Kinbook could neither establish that it held a valid, protectable mark nor that Microsoft's use created a likelihood of confusion.

Lapp Factors Applied. Judge Gene E. K. Pratter applied a 10-factor test for likelihood of confusion as set forth in *Interpace Corp. v. Lapp Inc.*, 721 F.2d 460 (3d Cir. 1983) (27 PTCJ 112, 12/1/83).

First, the court found little similarity between the marks in question—Kinbox and Munchkinbox versus Kinect, Xbox 360, and Kin—noting that the "visual appearances of these marks are wholly distinct."

Indeed, the only point of commonality was the use of the sequence "kin," the court said. "However, the use of a similar term in two marks does not give rise to the conclusion that the marks are so similar that they are likely to confuse."

Furthermore, the court pointed out that Kinbook had partially based its argument on the claim that Microsoft was using the mark "Kinect for Xbox," and that the sequences "kin" and "box" appearing in that term echoed its own "Kinbox" mark. However, Microsoft's mark was not "Kinect for Xbox," but merely "Kinect."

Even if the mark were as posited by Kinbook, the court said, "a reasonable jury would not find that 'Kinect for XBOX' looks, sounds, or means the same as the mark 'Kinbox.'" The court also said that the Kinect mark was always used in association with the mark "Xbox 360," which was even more distinguishable from "Kinbox."

No Conceptual, Market Strength. Turning to the question of the strength of Kinbook's marks, the court declined to definitively determine whether the marks were merely descriptive, as asserted by Microsoft. But the court did say that the common use of the word "kin" in marks relating to online social software made it a conceptually weak mark.

Additionally, the court said that Kinbook had failed to establish that its marks had "any sort of marketplace recognition," supporting a finding of weakness and weighing this factor for Microsoft.

Looking at the price of the goods and sophistication of consumers, the third Lapp factor, the court noted that the Kinect gaming sensor and the Kin phones were sufficiently ex-

KINECT
for XBOX 360



pensive such as to trigger a “great degree of care” on the part of consumers.

Court Contemplates 5-Year-Old Purchaser. The court rejected Kinbook’s argument that it should examine this factor from the point of view of the “least sophisticated consumer,” which, in the case of the Xbox 360, would be a 5-year-old child.

“First, it would be completely unreasonable to assign a 5 year-old as ‘the reasonably prudent purchaser’ for the purposes of this analysis,” the court said, adding wry comments regarding precocious children. “Second, even the hypothetical precocious 5 year-old dispatched by indulgent parents (or grandparents) to make her or his own selections of amusement would likely to be able to distinguish between a free software application, and a \$150 piece of gaming hardware.”

The court added that only consumers who already had an Xbox 360 or intended to acquire one would even consider purchasing a Kinect device. Thus, this factor also weighed in Microsoft’s favor.

No Actual Confusion. Kinbook proffered four instances which it claimed constituted evidence of actual confusion in this matter. However, the court said that only one of the four actually identified Kinbook, and none of them related to “mistaken purchasing decisions.”

Two of the instances were situations in which someone had merely speculated that the phrase “Kinect for Xbox 360” might be shortened to “Kinbox,” the court noted, and they were not situations in which the Microsoft products were being confused with Kinbook’s product.

In the last instance, a magazine article referred to the box in which Kin phones were packaged as a “Kin Box,” which, the court said, was merely use of the term “box” “in the most literal sense.”

Regarding Microsoft’s intent in adopting its marks, the court rejected the argument that the standard for bad intent was “carelessness” on Microsoft’s part. Indeed, the court said, *Freedom Card Inc. v. JP Morgan Chase & Co.*, 432 F.3d 463, 77 USPQ2d 1515 (3d Cir. 2005) (71 PTCJ 250, 1/13/06), explicitly rejected such a standard.

Absent any evidence of “predatory intent” on Microsoft’s part, the court weighed this factor in its favor.

No Common Channels of Marketing. The sole marketing channel shared by Kinbook and Microsoft was the Facebook social website, the court said. Actually, Facebook was Kinbook’s only marketing medium.

The court noted Microsoft’s own argument that “advertising on the internet and, more specifically, on Facebook has become vast and indiscriminate, and ‘virtually every business today’ uses the internet and Facebook for marketing purposes.”

Thus, the court reasoned, claiming that the two both advertise through Facebook was no different than claiming that they both use the internet, and was far too broad a claim to establish similar channels of marketing and advertising.

Similarly, the court said, accepting an argument that Microsoft was targeting the same set of consumers as Kinbook would mean to accept that “the target audiences of Kinect and Kinbox would overlap with practically every product and service in every industry on the market today. Evidence that Microsoft is ‘targeting’ what amounts to virtually every consumer in the world does not constitute meaningful evidence that it is targeting the same consumers as Kinbook.”



Remaining Factors Also Favor Microsoft. Under the ninth *Lapp* factor, similarity of function, the court found that the two companies’ products “all perform entirely different functions.” Thus, this factor also weighed for Microsoft.

Finally, regarding the question of likelihood that one party would expand into the other party’s market, the court noted that there was no intent on Kinbook’s part to enter the mobile telephone or video game markets, adding that the markets for mobile handsets and smartphone applications were “entirely distinct.”

Similarly, there was no evidence before the court that Microsoft intended to use its “Kin” marks into Kinbook’s market.

Taking the *Lapp* factors together, the court found that there was no triable question regarding likelihood of confusion and granted summary judgment in favor of Microsoft.

Microsoft was represented by Floyd A. Mandell and Cathay Smith of Katten Muchin Rosenman, Chicago. Kinbook was represented by Richard Gallucci of Lauletta Birnbaum, Turnersville, N.J.

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