

Microsoft Kinect Didn't Infringe Kinbox Mark, 3rd Circ. Rules

By Bill Donahue

Law360, New York (January 10, 2013, 3:19 PM ET) -- The Third Circuit ruled Thursday that consumers were unlikely to confuse Microsoft Corp.'s Kinect gaming device with a small software company's "Kinbox" Facebook application, affirming the dismissal of the company's reverse confusion trademark suit.

The appeals court agreed with U.S. District Judge Gene E.K. Pratter's January 2012 ruling that Kinbook LLC failed to show that Microsoft's Kinect brand name was confusingly similar to the older Kinbox trademark.

"The district court concluded that no reasonable jury could find a likelihood of confusion between the parties' marks exists," U.S. Circuit Judge Marjorie Rendell wrote for the court. "We see no need to expand upon the district court's thorough analysis and surely cannot improve upon its sound reasoning."

Filed in September 2010, the case was a classic example of alleged reverse confusion, a doctrine that allows a small but more senior user of a mark to sue a commercially dominant but junior user. While trademark suits normally claim that a small company is trying to hitch a free ride on a popular name, reverse confusion suits aim to block a big company's media blitz from drowning out a legitimately trademarked brand of a smaller company.

Kinbook, which developed and sells Kinbox and Munchkinbox on Facebook as software that friends and family could use to share messages, videos and photos. The company claimed Microsoft's highly advertised release of Kinect — a motion-sensor device for the Xbox console — unfairly cornered the market on the kin-related name and lowered the value of the "Kinbox" trademark.

The software giant's overwhelming marketing dollars rendered Kinbook's first-in-time registration of its Kinbox and Munchkinbox marks useless, and effectively pushed them out of the market," the complaint said.

Microsoft fired back in July 2011, arguing, among other things, that it was clear that the marks were visually and phonetically different. The Kinect logo was made of simple, unadorned lettering paired with the lime green and silver Xbox logo, the company said, while Kinbox featured an orange and blue font with a photo box in place of the "o" in the word.

And in January, Judge Pratter agreed.

“The visual appearances of the these marks are wholly distinct, and the ordinary consumer could not reasonably conclude that the Kinect gaming sensor or the Kin phone are in any way related to the Kinbox Facebook application,” the Jan. 25 opinion said.

Judge Pratter also found no evidence that Microsoft was aware of the Kinbox mark or that it had intentionally pushed Kinbook out of the market by using a name that incorporated “kin.”

Both parties were unavailable for comment on the ruling Thursday.

Kinbook is represented by Richard D. Gallucci Jr. and Steven H. Doto of Lauletta Birnbaum LLC.

Microsoft is represented by Floyd A. Mandell, Cathay Y.N. Smith and Christine E. Bestor of Katten Muchin Rosenman LLP and by William T. Hangle and Bonnie M. Hoffman of Hangle Aronchick Segal Pudlin & Schiller.

The case is Kinbook LLC v. Microsoft Corp., case number 2:10-cv-04828, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Richard McVay.

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