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## Apple: The Keeper of all that is "Pod"?

by Cortney Arnold

In recent years, the Apple iPod has soared in popularity among consumers of all ages. Nationwide, the iPod boasts a seventy-five percent share of the digital music player market. With such success, it is no wonder that Apple vigorously defends this profitable trademark—iPod. Indeed, in recent months, Apple Computer has sent numerous "[cease and desist](#)" letters to companies using the term "pod" in their business, claiming that the use of the word "pod" causes a substantial confusion with Apple's iPod and thereby demanding that the companies cease using any word or phrase containing the term "pod" in it.

This post will examine two different claims of confusion by Apple using a list of factors set out in *Polaroid Corp. v. Polarad Electronics Corp.* U.S. courts use the Polaroid factors to determine whether there is a likelihood of confusion between two marks. These are the factors: (1) strength of the mark; (2) degree of similarity between the conflicting marks; (3) proximity of the goods or services; (4) likelihood that the senior user will bridge any gap between the goods or services of the parties; (5) actual confusion; (6) the junior user's good faith in choosing its marks; (7) the quality of the junior user's product; and (8) the sophistication of the buyers.

Apple's first claim is against a small business that makes arcade games—Mach 5 Products. Mach 5 Products developed a device that digitally reads the games' mechanical counters (previously one had to open the machine and manually take a reading off the counter). Via infrared technology, the device transmits the accounting information from the game to a computer spreadsheet—all without having to manually open the arcade game. The problem for Apple is the name of the device—"Profit Pod." However, Apple's claim of confusion against the "Profit Pod" doesn't have any merit because


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there is no confusion between iPod and Profit Pod. The third Polaroid factor, lack of proximity of between the iPod and the Profit Pod, goes against Apple's claim of confusion. For one, the products are in two entirely different markets—digital entertainment and arcade game equipment. Two, the products are marketed and sold to entirely different consumers—the iPod to retail consumers and the Profit Pod to business consumers. Third, the two products do not share any sort of resemblance which goes to the fifth factor of “actual confusion,” or in this case, the lack thereof. Moreover, under the eighth factor of buyer sophistication, the Profit Pod is marketed and sold to tech-savvy businesspeople in the arcade gaming business—an entirely different market than that of the iPod and used in entirely different ways than the iPod, there is little likelihood that iPod consumers or Profit Pod consumers will be confused as to the manufacturer of these respective products.

The second claim is a bit more complex. Apple is raising the flag of confusion against a company called Podcast Ready. Much like Apple iTunes, Podcast Ready works by transferring podcasts directly to a portable device whenever that device is connected to a computer. However, Podcast Ready allows the user to update their players' podcasts using any computer, as opposed to iTunes which is mainly compatible with Apple iPods solely.

So Apple's argument seems to be that the use of the term “pod” in “Podcast Ready” leads consumers to believe that it is an Apple product due to the popularity of the Apple iPod and consumer association with the term “pod” to Apple products. Based on the Polaroid factors, such confusion is arguably warranted. Podcast Ready is marketed and sold to Apple's consumers, is compatible with the Apple iPod, mimics. However, this claim is more complex due to the fact that “podcast” is arguably not a term that can be trademarked due to its generic nature. Though one could debate whether or not “podcast” has suffered from what those in the IP community call “genericide,” the evidence is highly against Apple on this issue. Like a typical digital recording, anyone can create a podcast using equipment and software purchased from any number of companies including Apple. Two, the term “podcast” has stuck with the general public and is used to refer to any and all broadcasts that can be downloaded onto a personal audio player over the Internet. So, like it or not, Apple has missed the boat for any claim over the term “podcast.”

Nevertheless, Apple is currently applying for a trademark on the word “pod.” The granting of such a trademark would effectively give Apple proprietary use of the word against all other companies. If no exception is carved out for the word, then a new term would also need to be used to refer to non-Apple affiliated podcasts, e.g. netcast. Ownership over the term “podcast” is highly unlikely, due to the public's frequent and indiscriminate use of the word on a daily basis. Such a trademark could arguably even violate the right of free speech, which certainly is not trumped by trademark protection.

In conclusion, though Apple's actions may be warranted in an effort to avoid dilution of its iPod trademark (a whole separate issue), these efforts in the cases discussed above do not rise to the level of confusion warranted under Polaroid, nor does Apple's trademark give it automatic ownership over any term containing “pod.”

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**Anna** :: 12/27/06 at 6:45 am

When you look for the word "pod" in the dictionary, you are sure to find various meaning of it. For years until Apple Computer used this word for their new digital invention, "pod" may have been uttered by single person or two. Yes, Apple may not own the "pod" word because it belongs to every man but let's give credit to them 'coz they really made it famous. I believe they have the right to question other companies that uses the word, in which can really generate confusion between those gadgets to Apple's popular iPod.