

**THIS OPINION IS NOT
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OF THE TTAB**

Mailed:
Nov. 3, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aristocrat Technologies Australia PTY Limited

Serial No. 76460411

Bernhard Kreten and Scott Hervey of Bernhard Kreten, Esq. & Associates for Aristocrat Technologies Australia PTY Limited.

Sonya B. Stephens, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Seeherman, Bucher and Grendel, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark RED BARON (in standard character form) for goods identified in the application (as amended) as "gaming

devices, namely, gaming machines and associated software for use therewith, to enable the gaming machine to run.”¹

The Trademark Examining Attorney has issued a final refusal to register applicant’s mark, on the ground that the mark, as applied to applicant’s identified goods, so resembles the mark RED BARON, previously registered (in standard character form) for goods identified in the registration as “computer game programs,”² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant has appealed the final refusal. Both applicant and the Trademark Examining Attorney have submitted evidence in support of their positions, and the appeal is fully briefed. We affirm.

Our determination under Section 2(d) is based on an analysis of all of the 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

¹ Serial No. 76460411, filed on October 22, 2002. The application is based on applicant’s allegation of a bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

² Registration No. 1679024, issued on March 10, 1992. Affidavits under Sections 8 and 15 accepted and acknowledged; renewed.

(Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In this case, additional factors which are pertinent to our analysis are the trade channels in which the goods are sold, the classes of purchasers to whom they are sold, and the sophistication of those purchasers and the care with which the goods are purchased.

We find, under the first *du Pont* factor, that applicant's mark and the cited registered mark are both RED BARON, and that they therefore are identical in terms of appearance, sound, connotation and overall commercial impression.

Under the second *du Pont* factor, i.e., the relatedness of the goods, our analysis and determination are made in accordance with the following principles. It is not necessary that applicant's and registrant's goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods be related in some manner, or that the circumstances surrounding their use be such that they would

be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Moreover, the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods and the registrant's goods that is required to support a finding of likelihood of confusion. Where the applicant's mark is identical to the registrant's mark, as it is in this case, there need be only a viable relationship between the respective goods in order to find that a likelihood of confusion exists. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); and *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

In this case, the goods identified in the cited registration are "computer game programs." Applicant's goods are identified as "gaming devices, namely, gaming machines and associated software for use therewith, to enable the gaming machine to run." As the dictionary evidence made of record by applicant shows, "gaming" is defined as "the act or practice of gambling." Webster's New World Dictionary (2d College Edition) at 574.

Applicant notes that the software referred to in its identification of goods is not sold separately to purchasers, but rather is intrinsic and incidental to the gaming devices themselves.

We find, therefore, that the goods involved in this appeal are applicant's gaming devices (i.e., gambling devices such as slot machines; see applicant's brief at 10), and registrant's "computer game programs." Applicant has argued throughout prosecution of this case that the fact that applicant's and registrant's goods both involve computer software is not determinative. The Trademark Examining Attorney agrees, and has specifically stated (at page 4 of her brief) that "...even if the applicant were to delete software from its current identification of goods (which is 'gaming devices namely gaming machines and associated software for use therewith'), the applicant's

remaining gaming machine goods would still be considered similar to the registrant's computer game programs."

In support of her Section 2(d) refusal, the Trademark Examining Attorney has submitted printouts of eight use-based third-party registrations which include, she contends, both applicant's type of goods and registrant's type of goods. We note that although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

We find that several of these third-party registrations are of marks which specifically include, in their identifications of goods, both gaming or gambling devices, on one hand, and computer games, on the other hand. For example, Reg. No. 2745324 is of the mark THE CHICKEN GAME, which includes in its identification of goods both "gaming equipment, namely, slot machines with or without video output" and "computer game programs." Reg. No. 2799992 is of the mark INTERBLOCK, which includes in

its identification of goods both "gaming equipment, namely gaming machines, slot machines, video slot machines, casino gambling machines," and "computer games, namely video game software." Reg. No. 2673863 is of the mark I DREAM OF JEANNIE, which includes in its identification of goods "slot machines, electronic gaming machines, computer game cartridges, and computer games on CD-ROM."

We find, under *Trostel and Mucky Duck, supra*, that these third-party registrations are entitled to probative value in support of the Trademark Examining Attorney's contention that applicant's goods are related to registrant's goods.

There is additional evidence in the record which supports a finding that applicant's "gaming devices" are related to registrant's "computer game programs" such that source confusion is likely to result from use of these identical marks on the respective goods. By way of background, we note that Applicant has attached to its main appeal brief (as Exhibit E) a copy of Regulation 14 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board (hereinafter "Regulation 14"), and requests that we take judicial notice thereof; we shall do so. *In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694,

1699 n.15; *Quaker Oats Co. v. Acme Feed Mills, Inc.*, 192 USPQ 653 (TTAB 1976).

Applicant, in its brief, cites to certain subsections of Regulation 14 which, according to applicant, show that the gaming industry is highly regulated, and that the purchasers of gaming devices such as applicant's are casino owners and their representatives who necessarily are professional, sophisticated purchasers. (We shall discuss the issues of trade channels, classes of purchasers and purchaser sophistication more fully below.)

However, Regulation 14 also is relevant to the issue of the relatedness of applicant's "gaming devices" and registrant's "computer game programs." Section 14.025 of the regulation pertains to themes which are allowable for gaming devices such as applicant's. It provides, at subsection 2(e), that the theme of a gaming device, in appropriate circumstances, may be based upon or derived from the theme of a computer game. That is, the regulation specifically contemplates that a gaming device and a

computer game program could be based on the same theme.³ Thus, consumers who are aware of the practice that gaming devices can be based upon or derived from computer games are likely to believe that applicant's RED BARON gaming device is based upon or derived from registrant's RED BARON computer game, and that there is a connection in sponsorship or source of the gaming device and the computer game. This connection between applicant's and registrant's goods weighs in favor of a finding that the respective

³ The regulation provides, in pertinent part, as follows (subsections 2(a) and 2(d) are included for context):

14.025 Certain themes prohibited in association with gaming devices or slot machines.

1. A gaming device or gaming device modification submitted for approval by a manufacturer or made available for play by a licensee must not use a theme that:
 - (a) Is derived from or based on a product that is currently and primarily intended or marketed for use by persons under 21 years of age...
 - (b) is otherwise contrary to the public policy of the state or would constitute an unsuitable method of operation.

2. In addition to any other factors deemed relevant, the following factors may be considered in determining whether a gaming device theme is prohibited by subsection 1:
 - (a) The subject matter of a television program or cartoon and the rating given to it by the National Association of Broadcasters, the National Cable Television Association, the National Cable Association or comparable rating entity;
 . . .
 - (d) The subject matter of a movie or animated feature and the rating given to it by the Motion Picture Association of America or comparable rating entity;
 - (e) The subject matter of a video or computer game and the rating given to it by the Entertainment Software Rating Board or a comparable rating entity;
 . . .

goods are related. Again, where the marks at issue are identical, as they are in this case, there need be only a viable relationship between the goods to support a finding of likelihood of confusion. Based on the evidence discussed above, we find that applicant's goods are related to the goods identified in the cited registration.

Regarding trade channels, classes of purchasers and the degree of care and sophistication with which the goods are purchased, applicant argues that its goods inherently are expensive, and that the sale, resale, licensing and operation of its goods are highly regulated by the state of Nevada and by the other states in which applicant does business, and that they are sold at trade shows to professionals who are careful, sophisticated purchasers, i.e., to casinos and other gaming establishments. The Nevada gaming regulations cited by applicant bear this out. In contrast, applicant argues, registrant's computer games presumably are marketed to young video game players who purchase the games, inter alia, online, at kiosks in shopping malls, and at specialty stores such as Circuit City and Best Buy. (Applicant's Oct. 20, 2003 response to the first Office action.) Applicant contends, therefore, that applicant's and registrant's goods are sold to

different classes of purchasers and in different trade channels.

We find, however, that even if the initial purchasers of applicant's gaming devices are professional, careful purchasers such as casinos and other gaming establishments, the classes of purchasers for applicant's gaming devices also include the ultimate users of such gaming devices, i.e., the patrons of the casinos and other gaming establishments who encounter and use applicant's gaming devices. See, e.g., *In re Infinity Broadcasting Corporation of Dallas*, 60 USPQ2d 1214 (TTAB 2001)(even if initial purchasers of radio advertising time are sophisticated and careful purchasers, in determining likelihood of confusion consideration must also be given to the ultimate users, i.e., the listeners of applicant's radio station); and *In re Artic Electronics Co., Ltd.* 220 USPQ 836 (TTAB 1983)(although the initial purchasers, i.e., owners of arcades, are sophisticated and careful purchasers of arcade games and coin and bill changer equipment, in determining likelihood of confusion consideration must also be given to the ultimate users of the arcade games and coin and bill changers, i.e., the arcade's customers who are the end users of the goods).

Similarly in this case, in determining likelihood of confusion, the classes of purchasers for applicant's gaming devices include not only the sophisticated initial purchasers of the gaming devices themselves, i.e., casinos and other gaming establishments, but also must include the ultimate users of such gaming devices, i.e., ordinary casino customers. Given the fact (of which we take judicial notice) that slot machines and other gaming devices may be played a penny, nickel or quarter at a time, these ultimate users of gaming devices must be deemed to be ordinary consumers and impulse purchasers who do not exercise more than an ordinary degree of care in deciding to play gaming devices in a casino. These casino patrons are also purchasers of registrant's computer games, either for their own use or the use of their children or others.

As discussed above regarding the relatedness of applicant's and registrant's respective goods, the Nevada gaming regulations specifically contemplate that the theme of a gaming device available in casinos may be based on or derived from the theme of a computer game. Thus, the casino patrons or ultimate users of gaming devices such as applicant's are among the class of purchasers of computer games such as registrant's. Applicant could offer a RED BARON gaming device that is based on or derived from

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registrant's RED BARON computer game. In such a situation, purchasers are likely to assume that a source or other connection exists.

After consideration of the relevant *du Pont* factors, we find that a likelihood of confusion exists.

Decision: The Section 2(d) refusal is affirmed.