

THIS DECISION IS NOT  
A PRECEDENT  
OF THE TTAB

Mailed: March 3, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Imagination Holdings Pty., Ltd.

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Serial No. 78692290

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Vincent M. Amberly of Litman Law Offices, Ltd. for  
Imagination Holdings Pty., Ltd.

Maria-Victoria Suarez, Trademark Examining Attorney, Law  
Office 102 (Karen Strzyz, Managing Attorney).

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**Before Rogers, Mermelstein, and Wellington, Administrative  
Trademark Judges.**

**Opinion by Mermelstein, Administrative Trademark Judge:**

Imagination Holdings Pty., Ltd., seeks registration of  
the mark SPIN THE BOTTLE (standard characters)<sup>1</sup> on the  
Principal Register for

Production of television programs; television  
entertainment services, namely, an ongoing  
television game show; production of television  
game show programs. International Class 41

The examining attorney issued a final refusal to  
register under Trademark Act § 2(d), 15 U.S.C. § 1052(d),  
on the ground that applicant's mark so resembles the mark

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SPIN THE BOTTLE (typed mark), previously registered for "entertainment in the nature of ongoing television programs featuring musical, variety and general interest segments dealing with events and personalities,"<sup>2</sup> that it would, if used on or in connection with the identified goods, be likely to cause confusion.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm.

**I. Applicable Law**

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry

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<sup>1</sup> Filed August 14, 2005, alleging a *bona fide* intent to use the mark in commerce.

<sup>2</sup> Registration No. 2267325, issued August 3, 1999, alleging dates of use and use in commerce as of October 1996. Trademark Act §§ 8 & 15 affidavits accepted and acknowledged.

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mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Restaurant Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

## **II. Record on Appeal**

In response to the first office action, applicant submitted the declaration of David P. Johnson, an employee in the offices of applicant's counsel. Mr. Johnson recounts his efforts (including two hours of Internet research) to learn whether the mark in the cited registration was actually in use. Attached to Mr. Johnson's declaration were the following:

- Specimens submitted with the cited registrant's Trademark Act §§ 8 & 15 filing;
- The result page from a "Hoovers" report returning information allegedly concerning the cited registrant, indicating that it did business in New York under the trade name Tad2000;
- A reference on AskMen.com stating that "SpinTheBottle.com is a cool interactive site that'll keep you entertained with wacky features."
- A Wikipedia article which, according to Mr. Johnson, indicates that the cited registrant created a television show (airing in Canada and Europe) called "Pop-Up Video." While we have examined this page carefully, the Board is unable to discern any reference to the registrant on this exhibit.

- Articles from WINDU.com and www.thefutoncritic.com purporting to refer to the cited registrant or its principals. Again, the Board is unable to find a reference to the registrant in the first article; the second contains the following reference:

The music channel is set to go ahead with the series, a pseudo-sequel to the networks popular "Pop-Up Video" series. Woody Thompson and his Spin the Bottle production company is behind the project, which is set to roll out in the spring or early summer.

- Hit lists from Google and MSN resulting from a search for "spin the bottle." Applicant has submitted the first ten of "about 615,000" hits from Google and the first eleven of "752,492" hits from MSN.<sup>3</sup>

### III. Preliminary Matters

Applicant devotes the bulk of its brief to suggestions that the cited registrant never used (or is not currently using) its registered mark, and that the registrant's Trademark Act § 8 filing was defective. Applicant complains that the examining attorney "chose to 'disregard'" these facts in refusing registration. Applicant urges that "it is ... critical that the Examiner's Reference actually be in use to preclude Applicant's mark from being approved for registration."

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<sup>3</sup> Both search result pages were submitted for the first time attached to applicant's brief on appeal. Normally, such evidence would be disregarded as untimely. Trademark Rule 2.142(d). However, because the examining attorney specifically addressed these search results, and did not object to them, we have considered this evidence. The other pages attached to applicant's brief are all duplicates of previously-submitted evidence. See *ITC Entm't Group Ltd. v. Nintendo of Am. Inc.*, 45

Contrary to applicant's argument, an examination of the validity of the cited registration or of the registrant's use of its mark lies well beyond the scope of this appeal. By statute, an issued registration is

prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate....

Trademark Act § 7(b). It is long-settled that an attack on the validity of a registration will not be heard in an *ex parte* proceeding, in which the owner of the cited registration has no right to appear. See, e.g., *In re Dixie Rest.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278 (CCPA 1971); *In re Pollio Dairy Prod. Corp.*, 8 USPQ2d 2012, 2014-15 (TTAB 1988). The examining attorney was correct to "disregard" these arguments, and we have done the same.

#### **IV. Likelihood of Confusion**

##### **A. Similarity of the Marks**

The marks at issue in this case consist of the identical words SPIN THE BOTTLE. Moreover, both marks are registered without respect to any particular typeface,

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USPQ2d 2021 (TTAB 1998) (filing of unnecessary papers strongly discouraged).

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stylization, or color. Accordingly, we must consider the marks to be identical in every respect.

**B. Similarity of the Services**

We thus begin our analysis of the respective services with the premise that, because the marks at issue are identical, the extent to which the applicant's and registrant's services must be similar or related to support a finding of likelihood of confusion is lessened. See *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is only necessary that there be a viable relationship between the two to support a finding of likelihood of confusion. See *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Further, our analysis is limited to the goods or services set out in the application and those in the cited registration. Where those goods or services are identified broadly, we must construe them as such, despite any extrinsic evidence purporting to show that the applicant or registrant is engaged in different or more limited activities than would be covered by its registration. See, e.g., *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1717 (TTAB 1992).

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In the case at bar, applicant identifies services of providing television production services, both generally and with respect to game shows, and providing entertainment services in the form of a television game show. The cited registration also recites entertainment services in the form of television programs, specifically featuring musical, variety and general interest segments dealing with events and personalities.

Because applicant's services include "television production services" without limitation, we must consider the application to cover production of all television programs, including the very types of programs identified in the cited registration. The "viable relationship" between producing a television program and providing the program itself is obvious. We have little doubt that viewers and advertisers, accustomed to seeing the registrant's mark used in connection with its television entertainment services would, upon seeing applicant's mark used and credited for the production of television programs, believe that there is a common source or sponsorship of both services.

Applicant's television programs and those of the cited registrant are likewise closely related. Although applicant identifies game shows and the registrant's

television programs are directed toward other areas of entertainment, both are in the same genre, namely, television entertainment. Given the identical marks at issue, we again have little doubt that viewers would conclude that such programs have a common source.

We note that the selection of television programs requires only a remote control and an opposable thumb. Such decisions are not typically accompanied by long study and careful deliberation, nor are viewers of such general-interest programming necessarily sophisticated. Under such circumstances, the likelihood that confusion will occur is heightened.

**C. Strength of Cited Mark**

Applicant argues on appeal that the cited registrant's mark is weak, relying on its Google and MSN searches for "spin the bottle." We agree with the examining attorney, however, that result summaries from search engines are usually of very little probative value. They do not necessarily reflect the way a term is used on the webpage itself, nor do they show use of a particular term in context.<sup>4</sup> *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82

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<sup>4</sup> Further, it is quite possible that at least some of the displayed hits refer (or are owned by) the cited registrant. See, e.g., "Spin the Bottle - Cast, Crew, Reviews, Plot Summary...." [us.imdb.com/title?0131596](http://us.imdb.com/title?0131596); "Spin The Bottle"

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USPQ2d 1828 (Fed. Cir. 2007); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002). This case is no exception; most of the references on the result listing include just a few words in which the term is embedded, and some offer no context at all. And as the examining attorney notes, just because a term is often used in another context does not demonstrate that the mark is weak in *this* context.

But even accepting applicant's premise for the sake of argument (and we make no such finding), it is undeniable that even weak marks are entitled to protection. *King Foods, Inc. v. Town & Country Food Co., Inc.*, 159 USPQ 44 (TTAB 1968). Here, we are presented with identical marks used for closely related services. Applicant's position here would essentially give the registrant's mark no protection at all. Applicant's arguments thus lack both factual and legal support.

**V. Conclusion**

After careful consideration of the briefs and the evidence of record, we conclude that, in view of the identical marks at issue, their contemporaneous use on the related services involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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www.spinthebottle.com. But without further examination of the webpage itself, it is unlikely that this could be determined.

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**Decision:** The refusal under Trademark Act § 2(d) is affirmed.