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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sakar International, Inc.

Serial Nos. 78955234 and 78955305

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International, Inc.

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Before Quinn, Hairston and Zervas, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applications were filed by Sakar International, Inc.
to register the mark MAXIMO CONCEPTS (standard character
form) for the following goods:

computer game accessories, namely, joysticks, game
controllers, cases, namely, game protective cases
and gaming accessory carrying cases, video screen
and hand-held game guards, USB cables, car
chargers, AC adapters, steering wheels for video

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games, gel skins, battery packs, FM transmitters, extension cables, and dancing mats in International Class 9; and

television home console game accessories, portable electronic console game accessories and computer game accessories, namely, joysticks, game controllers, cases, namely, game protective cases and gaming accessory carrying cases, video screen and hand-held guards, USB cables, car chargers, AC adapters, steering wheels for video games, gel skins, battery packs, FM transmitters, headphones, extension cables and dancing mats in International Class 9.¹

The trademark examining attorney refused registration in each application under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the following registrations owned by the same entity:

Registration No. 2633190, issued October 8, 2002, for the mark MAXIMO GHOSTS TO GLORY for "computer game software, computer game cartridges; computer game cassettes; computer game discs; computer game tapes; video game cartridges; video game machines for use with television receivers," and

Registration No. 2978772, issued July 26, 2005, for the mark MAXIMO VS ARMY OF ZIN for "computer game software, computer game cartridges, computer game cassettes, computer game discs, computer game tapes, video game cartridges, video game machines for use with television receivers, downloadable game software and downloadable computer games."

When the refusals were made final, applicant appealed.

¹ Application Serial Nos. 78955234 and 78955305, respectively. Both applications were filed on August 18, 2006, alleging first use anywhere and first use in commerce on March 15, 2005. Also, both applications include a disclaimer of the word CONCEPTS, and the statement that "[t]he English translation of the foreign word 'MAXIMO' is 'MAXIMUM'."

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Applicant and the examining attorney have filed briefs.

In view of the similar records and issues in these two applications, we have consolidated the applications for purposes of final decision. Thus, we have issued this single opinion.

Insofar as applicant's goods and the goods in the cited registrations are concerned, applicant argues that they are very different in nature and are sold in different sections of retail stores. Applicant maintains that there is no per se rule that computer hardware and computer software are related products, and that its computer game accessories and television home console and portable electronic console game accessories are unrelated to registrant's computer and video games. Insofar as the respective marks are concerned, we note that applicant does not argue that its mark is dissimilar from the registered marks.

The examining attorney, on the other hand, maintains that applicant's and registrant's good are complementary and related goods; and that such goods would travel in the same channels of trade to the same classes of purchasers. Furthermore, the examining attorney argues that the marks are similar in that applicant's mark and the cited marks share the identical term, MAXIMO.

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Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services.

We first turn to the similarity or dissimilarity of the involved goods. In comparing the goods, it is not necessary that they be identical or competitive in nature in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used therewith, to the mistaken belief that the goods originate from or are in some way associated with the same source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978). The issue of likelihood of confusion must be determined on the basis of the goods

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as set forth in the applications and the cited registrations. *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Applicant's goods are computer game accessories and television home console and portable electronic console game accessories while registrant's goods are computer and video games. Clearly, applicant's and registrant's goods are not identical, but we cannot agree with applicant that they are unrelated. While there is no rule that considers all computer products to be related, applicant's and registrant's goods are sufficiently related. Applicant's television home console, portable electronic console and computer game accessories may be used with registrant's computer and video games, and the goods are therefore complementary in nature.

Moreover, there are no limitations in applicant's identifications of goods and registrant's identifications of goods. We must accordingly presume that applicant's and registrant's goods are marketed in all normal trade channels for such goods (including consumer electronic stores and mass merchandisers) to all normal classes of purchasers for such goods (including ordinary consumers). *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

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Applicant argues that applicant's and registrant's types of goods are sold in different sections of retail stores. Even assuming that applicant's and registrant's types of goods would be sold in different sections of a retail store, an individual on a shopping trip may select a computer and/or video game from one section of the store and accessories for use in connection therewith from a different section of the store.

In addition, applicant argues that the purchasers of the involved goods are discriminating and are careful in making their decision to purchase such goods. However, this argument is unsupported by any evidence in the record, and we find it to be unpersuasive in any event. Computer and video games and accessories for use in connection therewith are marketed to the same classes of purchasers including ordinary consumers who would exercise nothing more than ordinary care in purchasing these goods.

The examining attorney has made of record several use-based third-party registrations in an attempt to show that goods of the type identified in the applications and the cited registrations may be sold under a single mark by a single source. Third-party registrations which individually cover a number of different goods and which are based on use in commerce are probative to the extent

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that they suggest that the listed goods are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). In this case, the registrations show adoption of the same mark by the same entity for, inter alia, several of the accessories identified in applicant's applications and the computer and video games identified in the cited registrations. In sum, we find that applicant's and registrant's goods are clearly related, and would be offered in the same channels of trade and be bought by the same classes of purchasers.

Turning then to a consideration of the marks, we must determine whether applicant's mark and registrant's marks, when compared in their entirety, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial

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impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

We find that when applicant's mark MAXIMO CONCEPTS and registrant's marks MAXIMO GHOSTS TO GLORY and MAXIMO VS ARMY OF ZIN are considered in their entireties, the overall similarities in the marks far outweigh their differences. Applicant's mark and registrant's marks begin with the identical term MAXIMO, and it often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered. *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895 (TTAB 1988). Also, MAXIMO is the dominant feature in applicant's mark because the additional word, CONCEPTS, has been disclaimed. The result is that applicant's mark is similar to each of the cited marks in sound and appearance.

With respect to meaning, we acknowledge that the cited marks MAXIMO GHOSTS TO GLORY and MAXIMO VS ARMY OF ZIN appear to connote a character and game titles, and give registrant's marks somewhat different connotations from applicant's mark MAXIMO CONCEPTS. Nonetheless, we find

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that the similarities in sound and appearance outweigh any differences in connotation.

Further, when applicant's mark and each of registrant's marks are considered in their entirety, the marks engender sufficiently similar overall commercial impressions that when related goods are offered thereunder, confusion would be likely to result among consumers.

Purchasers familiar with registrant's MAXIMO GHOSTS TO GLORY and MAXIMO VS ARMY OF ZIN computer and video games may well believe that MAXIMO CONCEPTS identifies computer game accessories and television home console and portable electronic game accessories originating from registrant. Indeed, several of applicant's accessories are specifically designed for use in playing computer and video games. Also, as previously noted, applicant does not argue that its mark is dissimilar from the registered marks.

Applicant asserts that there have been no instances of actual confusion, and this shows that confusion is not likely to occur. We are not persuaded by this argument. Applicant has not provided any evidence as to the extent of its use, nor is there any evidence as to registrant's use (indeed, as indicated below, applicant contends that registrant's products are not currently listed at registrant's website), such that we can determine whether

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there has been a meaningful opportunity for confusion to occur. "Uncorroborated statements of no known instances of actual confusion are of little evidentiary value... The lack of actual confusion carries little weight ... especially in an ex parte context." *Majestic Distilling*, 65 USPQ2d at 1205.

As noted, applicant maintains that registrant's products are not currently listed at registrant's website and therefore there is no possibility of confusion. To the extent that applicant implies that registrant is no longer using its marks, applicant's argument is in the nature of an impermissible collateral attack on the cited registrations and is not persuasive.

Applicant also refers to an application filed by a third-party for the mark MAXIMO that was brought to applicant's attention by the examining attorney. Applicant states that this application has now matured into Registration No. 3415714 for computer hardware accessories. Even if this registration was properly of record, a third-party registration cannot be used to justify the registration of another confusingly similar mark. In re *J.M. Originals*, 6 USPQ2d 1393, 1394 (TTAB 1988).

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In sum, because similar marks are to be used in connection with related goods, we find that there is a likelihood of confusion.

To the extent that there is any doubt on the likelihood of confusion, we resolve that doubt in favor of the prior registrant. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal to register under Section 2(d) is affirmed in each application.