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PRECEDENT OF THE T.T.A.B.

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michael Tretyakov

Serial No. 78961373

Dmitri I. Dubograev of International Legal Counsels PC for
Michael Tretyakov.

Steven W. Jackson, Trademark Examining Attorney, Law Office
107 (J. Leslie Bishop, Managing Attorney).

Before Seeherman, Kuhlke and Walsh, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Michael Tretyakov seeks registration on the Principal
Register of the mark SUGAR GAMES (standard character
format, "games" disclaimed) for goods and services
identified as "entertainment multimedia computer games and
computer game software; electronic game programs for
computers and mobile devices; computer game programs;
interactive game programs; downloadable electronic game
programs; electronic game software; downloadable computer
game software; computer game software contained on CDs, CD-

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ROMS, DVDs, and interactive CD ROMs; computer game discs featuring interactive video, computer games and interactive game software; user documentation sold as a unit therewith" in International Class 9, and "providing a website featuring information in the field of computer games, science fiction, video games and entertainment; providing information on-line relating to computer games and computer enhancements for games; entertainment services, namely, providing on-line computer games and on-line interactive games" in International Class 41.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with his identified goods and services, so resembles the registered mark SUGAR (in standard character form) for "entertainment services, namely, providing online games, online contests and online product trivia about games and toys, intended for consumers of all ages," in International Class 41, as to be likely to cause confusion, mistake or deception.²

¹ Application Serial No. 78961373, filed August 28, 2006, alleging first use and use in commerce on January 17, 2004 under Section 1(a) of the Trademark Act, 15 U.S.C. §1052(a).

² Registration No. 3140574, issued September 5, 2006.

Applicant has appealed the final refusal and the appeal is fully briefed. We affirm the refusal to register.

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, two key considerations are the similarities between the marks and the similarities between the goods and services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the first du Pont factor, i.e., whether applicant's mark "SUGAR GAMES" and registrant's mark "SUGAR" are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. The analysis is not whether the marks can be distinguished when compared side-by-side. Rather, we must determine whether the marks are sufficiently similar that there is a likelihood of confusion as to source and, in making this determination, we must consider the recollection of the average purchaser

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who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The sound, appearance, connotation and commercial impression of the marks "SUGAR GAMES" and "SUGAR" are very similar in that applicant's mark begins with the entirety of registrant's mark. The only difference between the marks is the addition of the word "GAMES" to applicant's mark. While we compare the marks in their entireties, it is well settled that "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985). "GAMES" has been disclaimed in the application in view of its descriptive or generic significance in the context of the identified goods and services. Therefore, the term "SUGAR" in applicant's mark deserves greater weight as it is the source-indicating portion of the mark.

Thus, analyzing the marks within these legal parameters, the addition of the term "GAMES" is not sufficient to distinguish otherwise identical marks. *In re*

Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004).

Applicant argues that the term "SUGAR" is weak in the field of computer and online games and that minor differences are sufficient to distinguish the marks. In support of this contention applicant submitted printouts from the USPTO's TARR database of two registrations owned by the same entity for the mark "SUGAR & ROCKETS" for use in connection with "computer game software recorded on magnetic or optical discs; recorded video discs featuring music and games owned by the same entity," and a printout of a Google search summary of the phrase "SUGAR & ROCKETS."³ Third-party registrations are not evidence of use and thus are not evidence in support of the du Pont factor pertaining to third-party use and the strength of the mark. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269-70 (CCPA 1973). With regard to the

³ The examining attorney objected to this evidence as untimely, as it was not submitted into the record during examination. Applicant responded that it was submitted as an attachment to his May 30, 2007 response to the Office Action. While the response references the attachments, no such attachments are visible in the electronic file. We have considered applicant's evidence attached to his brief, on the chance that it was an electronic error that did not process the incoming attachments. At a minimum, the examining attorney could have, either by phone or in the final office action, notified the applicant that the attachments, clearly referenced in his response, were not attached.

Google search summary, it has four "hits" displayed for "sugar and rockets" which may or may not refer to the computer games referenced in the third-party registrations. In re Fitch IBCA, Inc., 64 USPQ2d 1058, 1060 (TTAB 2002) (search result summaries are of limited probative value). In any event, this evidence does not establish that the term SUGAR is widely used by others in the same field and thus should be accorded a narrow scope of protection.

While third-party registrations may be relevant to show that a mark is descriptive, suggestive, or has a commonly understood meaning such that the public will look to other elements to distinguish the source of the goods or services, Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 675, 223 USPQ 1281, 1285-86 (Fed. Cir. 1984), this record, consisting of two registrations owned by the same entity, clearly does not establish that the word "SUGAR" has some meaning in the field of computer and online games.

In view of the above, the factor of the similarity of the marks weighs in favor of finding a likelihood of confusion.

We turn next to a consideration of the goods and services identified in the application and the cited registration. It is well settled that goods and services

need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods and services themselves, but rather whether purchasers are likely to confuse the source of the goods and services. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrant's goods as they are described in the registration and we cannot read limitations into those goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration describes goods broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Applicant's services in International Class 41, "providing a website featuring information in the field of computer games," "providing information on-line relating to

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computer games" and "providing on-line computer games," are encompassed by registrant's services in International Class 41, "providing online games, online contests, and online product trivia about games and toys." In addition, applicant's goods in International Class 9 which include "computer game programs" and "downloadable electronic game programs" are related in that they are the subject matter of registrant's services and, as to registrant's online games, they are competitive.

With regard to the channels of trade, because there are no specific limitations in either the registration or the subject application, we must presume that applicant's goods (or at the very least his "downloadable electronic game programs") and services and registrant's services will be sold in the same channels of trade and will be bought by the same classes of purchasers. See *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Applicant's unsupported arguments, limiting registrant's identification of services to its actual use in connection with a specific doll and confining registrant's channels of trade and customer base to younger children, fail inasmuch as applicant may not restrict the

scope of registrant's identification of services. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). As noted above, it is well-established that the Board must make its likelihood of confusion determination based on the services as they are identified in the cited registration and the application. *Hewlett-Packard, supra*.

In view of the above, the du Pont factors of the relatedness of the goods and services, and the channels of trade favor a finding of likelihood of confusion as to the cited registration.

Finally, applicant argues that "despite an extensive period of concurrent use of the Registered Mark and the Applicant's mark, there is no evidence as to the existence of consumer confusion of the source of those marks." Br. p. 3. First, there is nothing in the record to show that there has been a meaningful opportunity for such confusion to have occurred. In particular, we note that the cited registration claims a date of first use of only May 18, 2006; we do not regard two years of concurrent use as an "extensive period." More importantly, in the context of an *ex parte* proceeding, "the lack of evidence of actual confusion carries little weight." *Majestic Distilling, supra*, 65 USPQ2d at 1205.

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In conclusion, we find that because the marks are similar, the goods and services are related, and the channels of trade and purchasers overlap, confusion is likely between applicant's mark and the mark in the cited registration.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.