

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Collector's Edge of Tennessee, Inc., and The Fairfield Company, joined as party plaintiff¹

v.

The Edge Interactive Media, Inc.

Opposition No. 107,996
to application Serial No. 74/390,998
filed on May 14, 1993

James C. Nemmers of Shuttleworth & Ingersoll, PLC, for Collector's Edge of Tennessee, Inc., and The Fairfield Company, joined as party plaintiff

Dr. Timothy Langdell, CEO of The Edge Interactive, Media, Inc., pro se.

Before Quinn, Hairston, and Chapman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Stephen D. Grant and Gil Kane, joint applicants,
originally filed an application to register the mark EDGE

¹ The records of the Assignment Branch of this Office indicate that opposer's pleaded Registration No. 1,895,589 was assigned to The Fairfield Company by an assignment recorded at Reel 2359, Frame 0248 in August 2001. Accordingly, The Fairfield Company is hereby joined as a party plaintiff pursuant to Fed. R. Civ. P. 19(a). See also TBMP § 512.01.

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on the Principal Register for "printed matter, namely, comic books, comic book reference guide books, books featuring stories in illustrated forms, graphic novels, comic strips, picture postcards, comic postcards, printed postcards, trading cards, collectors [sic] cards featuring comic book characters, playing cards, novelty stickers, decals, and posters."² The application was assigned to The Edge Interactive Media, Inc. in February 1997, and the assignment was recorded in the United States Patent and Trademark Office in March 1997 (Reel 1561, Frame 0255).

Collector's Edge of Tennessee, Inc. filed the notice of opposition alleging that opposer has continuously used COLLECTOR'S EDGE as a trademark since prior to any date which may be claimed by applicant; that opposer owns Registration No. 1,895,589 for the mark COLLECTOR'S EDGE³ for "paper goods and printed matter; namely, football trading cards, decals and stickers;" and that applicant's mark, when used in connection with its goods, so resembles

² Application Serial No. 74/390,998, filed May 14, 1993, based on applicant's assertion of a bona fide intention to use the mark in commerce. Subsequently, on March 5, 1997, applicant filed an Amendment to Allege Use, with claimed dates of first use of November 30, 1993 and first use in commerce of April 31, 1994, which was accepted by the Examining Attorney.

³ Registration No. 1,895,589, issued May 23, 1995, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is November 30, 1991, and the date of first use in commerce is February 21, 1992.

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opposer's previously used and registered trademark as to be likely to cause confusion, mistake, or deception.⁴

Applicant, in its answer, denied the salient allegations of the notice of opposition.

The record consists of the pleadings; the file of the opposed application; opposer's notice of reliance, consisting of a current status and title copy of opposer's Registration No. 1,895,589; and the testimony of opposer's president, Alan Lewis, with exhibits. Applicant did not take any testimony or properly introduce any evidence.⁵ Nor

⁴ In its brief on the case, opposer also has asserted common law rights in the following marks: (1) EDGE for football and basketball trading cards; (2) EDGE ENTERTAINMENT for trading cards featuring comic book characters; and (3) a stylized depiction of COLLECTOR'S EDGE (shown below) for trading cards featuring fantasy characters:

Given our holding in this matter, we need not consider opposer's assertions of rights in various common law marks.

⁵ Applicant argues in its brief (p. 6) that it "filed its own Notice of Reliance on August 25, 2000 (in a timely manner)." However, no copy of applicant's notice of reliance was received by opposer or the Board until February 2001, when applicant attached a copy of its purported notice of reliance to its main brief as well as an "Appendix of Documents Relied Upon" (including copies of registrations printed out on February 10, 2001).

Applicant is well aware (or should be) that "the facts and arguments presented in the brief must be based on the evidence offered at trial. A brief may not be used as a vehicle for the introduction of evidence." See TBMP § 801.01. Because there is no proof of the timely filing of applicant's "notice of reliance," the contents thereof will not be considered by the Board. It should be noted, however, that, given the nature of

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did applicant attend or participate in the testimony deposition of Alan Lewis.

Both parties filed briefs on the case.⁶ An oral hearing was not requested.

With regard to the issue of priority, to the extent that opposer owns a valid and subsisting registration of its pleaded mark,⁷ the issue of priority does not arise. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); and *Carl Karcher Enterprises, Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995). Moreover, the record establishes opposer's prior and continuous use of its mark since February 1992.

Thus, the only remaining issue before the Board is that of likelihood of confusion. Our determination of

the "evidence" and the weight it is to be accorded, a consideration of applicant's proposed "evidence" would not alter the Board's ruling in this matter.

⁶ The Board notes that applicant filed its brief "under protest" due to its pending motions. There are no remaining pending motions. See Board orders dated January 11, 2001; January 12, 2001; January 23, 2001; February 14, 2001; and November 1, 2001.

Applicant is advised that factual statements made in briefs on the case can be given no consideration unless they are supported by evidence properly introduced at trial. See *BL Cars Ltd. v. Puma Industria de Vehiculos S/A*, 221 USPQ 1018 (TTAB 1983); and *Abbott Laboratories v. TAC Industries, Inc.*, 217 USPQ 819 (TTAB 1981). See also, TBMP § 706.02.

⁷ Applicant asserts throughout its brief that opposer has not shown that it is the owner of the pleaded registration. However, the records of the Assignment Branch of this Office include seven recorded documents supporting a proper chain of title to opposer.

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likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Specifically, in any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the goods and the similarities or dissimilarities between the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Based on the record before us in this case, we find that confusion is likely.

Turning first to a consideration of the parties' respective goods, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion, it being sufficient instead that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See In re Peebles, Inc., 23 USPQ2d 1795 (TTAB 1992); and In re International Telephone and Telegraph Corporation, 197 USPQ 910 (TTAB 1978). Nor is it necessary that a likelihood of confusion be found as to each item

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included within applicant's identification of goods. See *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983); *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); and *Alabama Board of Trustees v. BAMA-Werke Curt Baumann*, 231 USQP 408, footnote 7 (TTAB 1986).⁸

In addition, it is well established that the issue of likelihood of confusion must be determined in light of the goods set forth in the opposed application and pleaded registration and, in the absence of any specific limitations therein, on the basis of all normal and usual channels of trade and methods of distribution for such goods. See, e.g., *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Squirtco v. Tomy Corp.*, *supra*, 216 USPQ at 940; and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

With respect to the involved goods, we note that opposer's pleaded registration covers "football trading

⁸ Applicant states in its brief that it should at least be granted a registration "for all goods and services it applied for other than the specific goods of trading cards which opposer singled out." (Applicant's brief, p. 25). However, applicant did not submit any proposed amendment to its application. In any event, the record supports a finding of likelihood of confusion based on the involved marks and goods.

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cards, decals and stickers." Similarly, applicant's goods cover a variety of printed matter, including, "trading cards" and "novelty stickers, [and] decals." Because there is no limiting language which restricts the subject matter of these goods in the involved application, we must presume that applicant's goods encompass all types of trading cards, decals, and novelty stickers, including those related to the football-themed goods identical to those of opposer.

We also must presume that applicant's goods move through all the ordinary and normal channels of trade for such goods to all the usual purchasers for such products. See *Octocom Systems Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). See also *In re Elbaum*, 211 USPQ 693 (TTAB 1981).

Indeed, Alan Lewis, the president of opposer, provided the following testimony in his deposition taken on June 28, 2000:

- Q: Earlier you had mentioned that the same buyers for the stores and the chains purchased both sports and non-sports trading cards. Do they also stock sports and non-sports trading cards alongside one another?
- A: Yes.

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. . . .

- Q: Both sport and non-sport cards together?
A: That's correct.
Q: Side-by-side?
A: Correct.

See Deposition of Alan Lewis at pp. 42-43. Mr. Lewis confirmed the similar (if not identical) channels of trade of sports cards and non-sports cards in the following discussion:

- Q: So if you're looking at the cards, can you look from sports cards to non-sports cards and back again without any physical obstruction?
A: That's correct.

. . . .

- Q: . . . Do any large retailers you're aware of segregate sports cards from non-sports cards, put them in physically different locations?
A: No.
Q: Why do they keep them together?
A: It's mainly logistics. Trading cards is a particular category. There's one buyer. There's one jobber that will come around and stock those shelves. . . . It's the same product in the consumer's mind and it's sold in the same spot, and, you know, people are drawn to that one spot to find what they want.
Q: Do consumers purchase both sports and non-sports cards?
A: Yes.

See Lewis Deposition at pp. 44-45.⁹

Thus, applicant's "trading cards" must in legal contemplation be viewed as being identical to opposer's

⁹ Indeed, Mr. Lewis indicated that opposer itself produced both sports and non-sports cards. Dep. at pp. 11 and 56.

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goods since the term obviously includes trading cards with a football theme. Similarly, the same is true regarding stickers and decals. Consequently, the respective goods must be considered to move in the same channels of trade, and would be sold to the identical classes of purchasers.

Indeed, under the du Pont factors regarding conditions of sale, the average purchaser may be expected to exercise less care in the decision to purchase a less expensive article. Here, "these are not expensive items requiring one to exercise careful thought and/or expertise in their purchase. More often than not they are shelf items which are purchased on a somewhat casual basis." In re *Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992). See also, *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) ("[w]hen products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care").

Plainly, the marketing and sale of trading cards (even of different subject matters), if offered under the same or similar marks, would be likely to cause confusion as to origin or affiliation.

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When marks appear on virtually identical goods, the degree of similarity necessary to support a conclusion of likely confusion declines. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

We turn next to a consideration of the respective marks at issue. It is well settled that marks are considered in their entireties, but in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). We find the dominant origin-indicating portion of opposer's registered mark is the word EDGE, which is identical to applicant's mark. That is, the common significant element in both parties' marks is the same term, EDGE.

When considered in their entireties, the respective marks are similar in sound and appearance. Concerning the connotations of the respective marks, the term EDGE (when used alone) is arbitrary in connection with applicant's goods. Further, we find that the term COLLECTOR'S in

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opposer's pleaded registration is highly suggestive, if not descriptive, of the anticipated purchasers of opposer's goods - namely, card collectors - as well opposer's actual goods, collector's cards.¹⁰ While the mark COLLECTOR'S EDGE is somewhat suggestive of trading cards, nonetheless, the overall commercial impression of the marks is highly similar.

Moreover, the slight difference in the respective marks may not be recalled by purchasers seeing the marks at separate times. The emphasis in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than specific impression of the many trademarks encountered; that is, a purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrision, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992).

¹⁰ Opposer has submitted testimony establishing the similarity, if not interchangeability, of the terms trading cards and collector's cards. See Lewis Deposition at p.55.

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Even if potential purchasers realize the apparent difference between the marks EDGE and COLLECTOR'S EDGE, they may mistakenly believe that applicant's mark is simply a revised, shortened version of opposer's mark, with both marks serving to indicate origin in the same source.

Our finding above that certain of applicant's goods, specifically, "trading cards," "decals," and "novelty stickers," are legally identical to opposer's identified "football trading cards, decals and stickers," is more than sufficient to overcome the relatively minor differences between the parties' marks.

Thus, when we compare the parties' marks in their entirety we find that they are substantially similar in sound, appearance and commercial impression. See *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999). Their contemporaneous use, in connection with the same or closely related goods, would therefore be likely to cause confusion as to the source or sponsorship of such products.

Applicant's argument that there has been no actual confusion is unavailing as there is no evidence of record regarding applicant's geographic area of sales or amount of sales. Hence, it is not clear that there has been opportunity for confusion in the marketplace. Moreover,

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the test is whether there is a likelihood of confusion, not whether actual confusion has occurred. See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Accordingly, because of the similarity of the parties' marks; the identity of some of the parties' goods; and the similarity of the trade channels and purchasers of the respective goods, we find that there is a likelihood that the purchasing public would be confused when applicant uses EDGE as a mark for its goods.

Decision: The opposition is sustained, and registration to applicant is refused.