

IN THE OFFICE OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

October 19, 2020

Asmat Khan
Trademark Examining Attorney
Law Office 114

Serial No.: 88-773,564
Applicant: Pog Unlimited
Mark:



Dear Ms. Khan:

AMENDMENT

As requested by the Examining Attorney, Applicant amends its identification of goods as follows:

Toys, games and sporting goods, namely board games featuring milk caps, collector albums, game sheets and pads, and slammers sold as a unit; Equipment sold as a unit for playing boarding games, namely, slammers and milk caps; Trading cards for games, plush toys, action figures and accessories therefor in Class 28; and

Entertainment services in the nature of an ongoing television series featuring animation; entertainment services, namely, an ongoing series featuring animation provided through online streaming of audio, visual and audio-visual materials via a global computer network, video on demand transmissions, webcasts via the Internet, radio broadcasts and cable television in Class 41.

REMARKS

In the Office Action dated April 18, 2020, the Examining Attorney refused registration of Applicant's POG mark in Class 28 under Section 2(d) of the Trademark Act on the grounds of likelihood of confusion with two registrations owned by Web Entertainment, Ltd. ("Web") of Hong Kong. Web's first mark is POG, a mark in standard characters in Class 35 for "Dissemination of advertising for others via the Internet", and in Class 41 for "Providing a computer game that may be accessed by users on a global network and the internet; providing interactive multi-player computer games via the internet and electronic communication networks; electronic game services and computer game competitions provided by means of the internet; electronic game services provided by means of the internet; providing non-downloadable digital music via the internet; providing non-downloadable digital music from the internet; providing non-downloadable digital music via internet websites for use with mp3 players; information relating to entertainment and education, provided on-line from a computer database and the internet; provision of information relating to entertainment online from a computer database of the internet". Web's other registration consists of the word POG in a very stylized format, in Class 41 for "Entertainment services, namely, providing online video games and virtual reality games, providing temporary use of non-downloadable electronic games and virtual reality games, providing a website featuring games and puzzles". ("Web's Design Mark", Collectively referred to as the "Cited Marks".) Applicant respectfully disagrees with the determination that Applicant's Mark is likely to be confused with the Cited Marks for the reasons set forth below, and requests that the refusal to register Applicant's mark be withdrawn, and that its application be allowed to proceed to registration for the following reasons.

I. Consumer Confusion Between the Marks is Highly Unlikely.

The Examining Attorney correctly states that "[l]ikelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). The PTO considers a number of

factors identified in *Application of E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) when determining the existence or absence of likelihood of confusion as to the source of origin of goods and services. Numerous cases have held that not all of the *DuPont* factors may be relevant or of equal weight in any given case. Here, Applicant urges that the following factors are the most relevant and should be considered in evaluating whether concurrent use of the respective marks will be likely to cause confusion as to source of the goods and services:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
2. The similarity or dissimilarity and nature of the goods or services as described in an application or registration in connection with which a prior mark is in use;
3. The similarity or dissimilarity of established, likely- to-continue trade channels. Restriction of channels can avoid a § 2(d) conflict. Where the identification of goods is restricted to certain narrow channels of trade, it can avoid a finding of a likelihood of confusion with a registration for a similar mark for related goods.
4. The conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing;

A. The Marks Differ in Appearance, Sound, Meaning, Connotation, and Commercial Impression.

Applicant urges that the respective marks are sufficiently distinct in sight, sound and meaning such that consumer confusion is not likely. Applicant’s mark consists of the word POG in a highly stylized design format that contains a vague image of the world within the letter “O”. (“Applicant’s Logo”). Web’s marks consist of the word POG, and a logo that is comprised of a black box with the word POG in red outline format inside. Basically, the marks look extremely different from each other given the various distinct design elements in Applicant’s mark, and Web’s design mark.

Moreover, Web’s trademark POG has a very specific meaning; it is an acronym for “Play Online Games”. Web’s website pog.com very prominently defines POG as Play Online Games in two places at the very top of its home page. This fact is stated underneath the large stylized POG logo (one of the trademarks that this refusal is based on). Immediately underneath the POG logo is the underlined definition of the acronym POG, Play Online Games. This explanation to

consumers is also displayed at the very top center of the home page where it states “POG: Play Online Games”. See below.



As such Web’s trademark POG has a very specific meaning that is made clear on its website, where virtually any consumer of Web’s services, since Web’s services are ONLY offered via their website, will be made aware that the mark POG on this website stands for Play Online Games. It would be extremely difficult, let alone unlikely, for consumers to mistake Web’s services with the Applicant’s good and services.

On the other hand, Applicant’s Logo as used for the particular goods identified in this application is not an acronym for anything, nor does it have any other particular meaning. However, when consumers come across Applicant’s Logo in connection with Applicant’s goods, it might bring to mind the mark POG as used on the packaging of the very popular juice product that exhibits a friendly looking monster, with the word POG in extremely similar lettering, and they might wonder if the two products are related, which they are. See below.



The mark POG as used in the juice in fact an acronym for Passion, Orange, Guava and the packaging is very colorful and distinct. Or, perhaps, the consumer (or the consumer’s parents if consumer is too young), would be brought back to memories from years ago when POG was a craze and will wonder if the source of the goods and services is the same as way back when, which, of course, it is.

In short, the respective marks convey distinct commercial impressions, due to the design features in both Applicant’s mark and Web’s Design Mark and Web’s own defining of its POG mark on its website to mean Play Online Games, but also given the possible memories of use of the POG game by Applicant in previous years, as well as the connection with the popular juice

product bearing the word POG in the same distinctive lettering. These distinct commercial impressions imparted by the respective marks greatly minimize the likelihood of confusion among consumers.

B. The Goods and Services Offered Under Each Mark Are Dissimilar in Nature and Will Travel in Different Trade Channels, Making Consumer Confusion Highly Unlikely.

The courts and the T.T.A.B. have held that, even in a situation where two marks are identical, there is no likelihood of confusion “if the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source.” TMEP § 1207.01(a)(i) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related) and; *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks)). In this case, Web’s services are offered solely on its website, and are not even downloadable for use independently; Web does not have a video game that is sold in stores, or on any other platform to purchase. On the other hand, Applicant’s goods are tangible items that will be sold in stores and online. As such, consumers of Web’s services know that they need to go online in order to play the POG Online Games, which is made clear in the name of its website. In that regard, The Examining Attorney has provided a sample of video game companies to support the argument that the same entity commonly provides the goods and services offered by both Applicant and Web; that is, examples of companies that sell board games that are apparently based, or inspired by, video games, or vice-versa, as well as and other goods relating to the video games. However, Applicant urges that the Examining Attorney is comparing apples to oranges in this situation, because a majority of the companies in the evidence provided primarily offer video games on an external platform such as Nintendo or PlayStation, and not solely on their own websites. In addition, some of these companies do not offer their games online at all. As such these games are marketed and offered for sale in broader channels of trade that could, in fact, potentially intersect the trade channels in which Applicant’s goods will travel. However, this is not the case with Web’s services, offered

only on its website POG: Play Online Games. The trade channels in which Web's and Applicant's goods and services will travel, are completely distinct.

(J, should I list the games that the EA offered—and that they are played on Nintendo or PlayStation?)

C. Consumers of Web's Services Are Knowledgeable About Gaming Such That Consumer Confusion is Unlikely.

Another factor for the Examining Attorney to consider is the conditions under which consumers are buying the goods and services used in connection with Applicant's mark and Registrant's Mark, that is, "impulse" vs. careful, sophisticated purchasing. *E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361. While the goods and services offered by Applicant and Web, and their respective consumers, may not be considered sophisticated, Applicant urges that the consumers in this particular field, primarily Web's consumers who are approximately 8-10 years old, are extremely knowledgeable and discerning with regard to video games. This is a special subset of consumers that pay particular attention to the details of these games and the characters involved, such that they are likely to understand what game they are playing and if another video game or toy is related. In *E.S. Originals, Inc. v. Stride Rite Corp.*, 656 F. Supp. 484, 2 U.S.P.Q.2d 1934 (S.D.N.Y. 1987) where the issue was whether a child could discern between two different shoe brands, the court declared that often times the status of a particular product will heighten the scrutiny applied when a child (even along with a parent) is the consumer.

The scenario in *Stride Rite Corp.* is relevant to the situation at hand, in that the consumers of Web's Online Games are particularly knowledgeable and discerning regarding online games, minimizing the likelihood of confusion between Web's services and Applicant's goods.

In summary, Applicant respectfully requests that the Examining Attorney withdraw her refusal to register based on a likelihood confusion with Registrant's mark.

CONCLUSION

Applicant respectfully requests that the Examiner withdraw her refusal to register Applicant's mark in Class 28 under Section 2(d), based on the differences in appearance, sound, meaning and overall commercial impressions between Applicant's and Registrant's marks.

Dated: 10/19/20

Respectfully Submitted,

Joan Ohl Rochman, Esq.
ROCHMAN SLUSSER LAW