

Hearing:
April 27, 1999

Paper No. 28
HRW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB OCT. 27, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hasbro, Inc.

v.

Andre Keith Williams

Opposition No. 106,373
to application Serial No. 75/142,636
filed on July 31, 1996

Michael J. Bevilacqua and Donald R. Steinberg
of Hale and Dorr LLP for Hasbro, Inc.

Douglas J. McEvoy of Gifford, Krass, Groh, Sprinkle,
Patmore, Anderson & Citkowski, P.C. for
Andre Keith Williams.

Before Cissel, Chapman and Wendel, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Andre Keith Williams filed an application to register
the mark CLUCHÉ for "equipment for use in playing a board
game."¹

¹ Serial No. 75/142,636, filed July 31, 1996, based on an
assertion of an intent to use the mark in commerce.

Hasbro, Inc. filed an opposition to registration of the mark under Section 2(d) of the Trademark Act. Opposer alleges use, through its predecessors in interest, of the mark CLUE in connection with Class 28 goods since as early as December 1948; ownership of registrations for the same;² the acquisition of fame by the CLUE mark; licensing of the mark for use on a variety of other goods, including a movie, puzzles, and video and computer games; and the likelihood of confusion if applicant uses its mark CLUCHÉ on the goods specified in the opposed application.

Applicant, in his answer, denied the salient allegations of the notice of opposition. As "affirmative defenses," applicant set forth several arguments with respect to likelihood of confusion, contending that the lack of any incidents of actual confusion despite applicant's use of its mark for almost a year, and distinctions in the nature of the games to which the marks CLUE and CLUCHÉ are applied, make confusion unlikely.

The Record

The record consists of the file of the involved application; the trial testimony depositions, with exhibits,

² The pleaded registrations are:

Reg. No. 526,059 for CLUE for a board game, issued June 6, 1950; Sections 8 & 15 affidavits accepted and acknowledged, respectively; second renewal June 6, 1990; and Reg. No. 1,362,172 for CLUE for equipment sold as a unit for playing a video game, issued September 24, 1985; Sections 8 & 15 affidavits accepted and acknowledged, respectively.

Opposition No. 106,373

taken by opposer of applicant, Andre Williams; Holly Riehl, the Director of Global Marketing for opposer; and Philip Orbanes, President of Winning Moves, Inc.; opposer's notice of reliance upon opposer's first set of requests for admissions and applicant's responses thereto and upon opposer's Interrogatory Nos. 1, 5, 8, and 12 and applicant's responses thereto; the trial testimony depositions taken by applicant of Michelle Littman and Nancy Renick, toy store owners in Michigan, and of Matthew Kulaga and Dennis Goldsmith, managers of Media Play outlets; and applicant's notice of reliance upon applicant's first request for admissions and opposer's responses thereto and upon opposer's responses to applicant's corrected first set of interrogatories. Both parties filed briefs and participated in the oral hearing.

Opposer has set forth a full recitation of the facts in its brief and applicant has stated that he is substantially in agreement with this recitation. Accordingly, and because we find the recitation to be consistent with the evidence of record, we adopt the same for purposes of determining this case.

The Opposition

Priority is not an issue here, in view of opposer's introduction of status and title copies of several registrations during the deposition of Holly Riehl, proving

ownership of valid and subsisting registrations for the mark CLUE and variations thereof.³ King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Thus, we turn to the issue of likelihood of confusion and to the factors which are most relevant to the circumstances at hand. See *In re du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

A major factor in this case is the fame of opposer's CLUE mark. Opposer has clearly established by sales and advertising figures, as well as proof of recognition of its mark by 80% of U.S. households, the fame of its CLUE mark, as used in connection with board games and related items. Applicant has specifically stated that he does not contest the fame of opposer's mark. (Brief p. 3). Accordingly, we are guided in our determination of likelihood of confusion by the general principle enunciated by our chief reviewing

³ In addition to the two pleaded registrations, opposer introduced status and title copies of the following:

- Reg. No. 1,644,488 for CLUE and game board design for board games, issued May 14, 1991, Section 2(f), Sections 8 & 15 affidavits accepted and acknowledged, respectively;
- Reg. No. 1,853,187 for CLUE THE GREAT MUSEUM CAPER GAME for board game, issued September 6, 1994;
- Reg. No. 1,915,192 for CLUE for computer game software and video game software; issued August 29, 1995;
- Reg. No. 2,044,400 for CLUE for interactive mystery storybooks, issued March 11, 1997;
- Reg. No. 2,093,295 for CLUE for entertainment services in the nature of live theater productions, issued September 2, 1997; and
- Reg. No. 2,127,856 for CLUE FOR KIDS for jigsaw puzzles, issued January 6, 1998.

court in *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), cert. denied, 506 US 862 (1992), that the "Lanham Act's tolerance for similarity between competing marks varies inversely with the fame of the prior mark." See also *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), cert. denied, 506 US 1034 (1992).

First, we consider the degree of similarity of the marks CLUE and CLUCHÉ. Applicant has testified that his mark CLUCHÉ is intended to be a combination of the words "clue" and "cliché" and to be pronounced as two syllables, the first one being the same as the word "clue." The exhibits of record show the word CLUCHE being used with two literal pronunciation marks, i.e., CLŪCHÉ, on the game box, as would lead to a pronunciation by purchasers in the manner suggested by applicant. Moreover, the game is described as "the game of clues and clichés" and involves the guessing of clichés from oral or mimed clues given by teammates.

Opposer contends that the identical initial sound and similar connotation of having a relationship to clues is sufficient to lead to a likelihood of confusion between CLUE and CLUCHÉ, particularly when consideration is given to the fact that both marks are used on board games. Applicant

Opposition No. 106,373

insists that if the marks are considered in their entireties, there are differences in appearance, sound and meaning, and thus in overall commercial impression, which distinguish the marks.

There obviously are differences in appearance and sound between the marks CLUE and CLUCHÉ. When we turn to connotation or overall commercial impression, however, these distinctions fade. In applicant's mark CLUCHÉ the emphasis is on the prefix CLU (or "clue"), which is identical to opposer's famous mark. The connotation is the same, namely, that this is a game involving clues. Furthermore, opposer has introduced evidence that it has used variations of its CLUE mark for different versions or formats of its basic game in the past and that it has plans for expansion into new themed editions of CLUE. Thus, it would be reasonable for purchasers to view CLUCHÉ as a modification of opposer's basic mark CLUE for one more offshoot from the original game. In addition, opposer has introduced testimony to the effect that it is unaware of any other game presently on the market having the word "clue" as part of its name. Thus, purchasers would have even more reason to associate CLUCHÉ with opposer.

In summary, we find that applicant's mark CLUCHÉ creates the overall commercial impression of being a variant of opposer's mark CLUE, and that the fame of the mark CLUE

in the game industry clearly increases the likelihood for this association being made by the purchasing public. See *Century 21 Real Estate Corp. v. Century Life of American*, *supra*.

We next consider the similarity or dissimilarity of the goods upon which the marks are being used. As pointed out by opposer, the goods which are relevant to our determination of likelihood of confusion are the goods identified in applicant's application and in opposer's registrations and these goods are identical, namely, board games. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). While applicant may argue that his board game is an adult party game whereas opposer's board game is directed to younger players, and that his game is a guessing game and opposer's is a mystery solving game, such distinctions are irrelevant. Neither opposer nor applicant is restricted by the respective registration or application to any particular format for the board game upon which the marks CLUCHÉ and CLUE are used. Either party may change any aspect of its game at any time; the present differences could be eliminated.

Because of this identity of the goods, the channels of trade and potential purchasers must be considered to be the same. Furthermore, the evidence of record indicates that

Opposition No. 106,373

both applicant's CLUCHÉ game and opposer's CLUE game are currently sold in specialty toy stores and department stores, and that applicant plans to expand to the mass merchandisers through which opposer's game is sold. While the evidence shows that applicant's game may be shelved with the adult games and opposer's with the family or children's games, there is the distinct possibility that both games will be found in the same alphabetical arrangement and thus in extremely close proximity (as, for example, at Toys R Us stores). Moreover, games are typically purchased quickly and without prolonged contemplation, being priced in the \$15 to \$35 range. Although the evidence shows that purchase of the CLUE game is likely to be based on a prior familiarity with the game, such as a mother buying for her family the game she played as a child, this does not eliminate the potential for confusion with the CLUCHÉ game, whether from haste of purchase or from being confused by the CLUCHÉ mark. That opposer offers various forms of its basic game, as well as related products such as puzzles and story books, or even licensed products such as a movie and musical, under its CLUE mark or variations thereof, only increases the likelihood of confusion between CLUCHÉ and opposer's famous mark CLUE.

The factor upon which applicant places its strongest reliance is the lack of evidence of any actual confusion,

Opposition No. 106,373

despite the fact that applicant has been actively using its mark in the same channels of trade as opposer since November 1996. Applicant points not only to opposer's admission that it is unaware of any instances of actual confusion (Request for Admission No. 6) and the testimony of opposer's witnesses to this effect, but also to the testimony taken by applicant (in July 1998) of two toy store owners and two managers as to the absence of any known confusion in their particular stores in Michigan.

This latter evidence is of limited value. Only three of the stores stocked both games, and only two stores had carried the CLUCHÉ game for over a year. The highest number of CLUCHÉ games sold at any of these stores was less than 100, the smallest less than 10. In one store guidance was usually provided in the purchase of CLUCHÉ game, the game "not [being] an easy sell." [Littman deposition at 19]. The lack of any incidents of actual confusion in this restricted exposure of purchasers to both marks can hardly be deemed convincing evidence that the marks can coexist in the general marketplace without a likelihood of confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992).

Applicant has presented no evidence with respect to any other factor which might weigh in his favor. In view of the wide latitude of protection which must be accorded opposer's

Opposition No. 106,373

famous mark CLUE; the use by applicant of the mark CLUCHÉ on goods identical to opposer's; and the similarity of commercial impressions created by the marks CLUE and CLUCHÉ, we find the balance to fall in favor of opposer. There is a strong likelihood of confusion as to source when applicant uses his mark CLUCHÉ on board games.

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

R. F. Cissel

B. A. Chapman

H. R. Wendel
Trademark Administrative Judges,
Trademark Trial and Appeal Board