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9/13/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re PGB Partnership

Serial No. 75/438,587

Daniel P. Burke of Galgano & Burke for PGB Partnership.

D. Beryl Gardner, Trademark Examining Attorney, Law Office 107
(Thomas Lamone, Managing Attorney).

Before Quinn, Hohein and Holtzman, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

PGB Partnership has filed an application to register
the mark "PLAYERS CHOICE 21" for "casino game tables for card
games of chance used exclusively in commercial gaming
establishments."¹

¹ Ser. No. 75/438,587, filed on February 23, 1998, which alleges a
bona fide intention to use the mark in commerce. The term "21" is
disclaimed.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "PLAYERS CHOICE POKER," which is registered for "poker-type card games,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Preliminarily, we note that in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity of the goods and the similarity or dissimilarity of the marks. See, e.g., Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).³ Turning first to consideration of the respective goods, it is well settled that that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and cited registration. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp.,

² Reg. No. 2,129,556, issued on January 13, 1998, which sets forth dates of first use of July 5, 1997. The word "POKER" is disclaimed.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

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697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where the goods in the application at issue and in the cited registration are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for such goods and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Furthermore, it is well established that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re

International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Here, as the Examining Attorney points out in his brief, the "registrant has not limited the channels of trade through which its goods travel by excluding use in commercial gaming establishments." Thus, notwithstanding that applicant's goods are identified as "casino game tables for card games of chance used exclusively in commercial gaming establishments," the lack of any restrictions in the identification of registrant's "poker-type card games" means that, like applicant's goods, they may be used in commercial gaming establishments and, it would appear, registrant's goods could even be played on or utilized with applicant's goods.

In addition, not only has applicant not even questioned in its appeal brief that, as contended by the Examining Attorney, the respective goods are closely related, but the record contains several use-based third-party registrations of marks which are registered for "casino gaming tables and casino card games," "card games, [and] gaming tables," and "card games and gaming tables for use therewith." Although such registrations are admittedly not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that

the goods listed therein are of a kind which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. Clearly, therefore, both registrant's and applicant's goods would be sold through the same channels of trade for use in the same kinds of commercial gaming establishments. Accordingly, there is no real question that the respective goods, while specifically different, are so closely related that, if marketed or sold under the same or substantially similar marks, confusion as to their source or sponsorship would be likely to occur.

Turning, therefore, to consideration of the marks at issue, applicant argues that, notwithstanding the presence in both marks of the words "PLAYERS CHOICE," its "PLAYERS CHOICE 21" mark "presents an entirely different appearance, sound and connotation" from registrant's "PLAYERS CHOICE POKER" mark when the marks are considered in their entireties. In this respect, applicant further asserts that, as shown by the information of record concerning various third-party registrations, "[t]he casino and recreational game fields, in general, are diluted with marks containing 'PLAYERS CHOICE,' including variations thereof" and that, in view thereof,

"excluding Applicant's mark [from registration] is inconsistent and unfair."

The Examining Attorney, on the other hand, contends that "applicant's mark is not dissimilar to the registrant's mark," arguing that both marks begin with the words "PLAYERS CHOICE" and that:

The term POKER, which follows the first two terms of the registrant's mark is descriptive and has been disclaimed. The term 21, which follows the first two terms in the applicant's mark is descriptive and has been disclaimed. The significant element of both marks is the term "PLAYERS CHOICE." Use of such descriptive words as POKER and 21 does not serve to distinguish between these marks. For that reason, the consumer may be misled to believe that the registrant now provides casino game tables in commercial gaming establishments for its poker-type card games, such as twenty-one.

Here, confusion as to source is likely because the applicant's mark ... looks, sounds and has a similar meaning to the registrant's mark ... for goods in the same field.

As to the various third-party registrations for marks which consist of or contain the word "PLAYERS CHOICE" or variants thereof, the Examining Attorney accurately points out, in our view, that none of such registrations covers goods which are as closely related to applicant's goods as are the goods in the cited registration.

We agree with the Examining Attorney that, when considered in their entirety, the marks "PLAYERS CHOICE 21"

and "PLAYERS CHOICE POKER" are substantially similar in sound and appearance. While concededly the term "21" is not identical or even similar in connotation to the term "POKER,"⁴ both marks overall are nevertheless substantially similar in structure in that each begins with the words "PLAYERS CHOICE" followed by the generic name of a card game of chance. When applied to the respective goods, it is obvious that the terms "21" and "POKER," as confirmed by the disclaimers thereof, are descriptive of applicant's and registrant's goods and, since they are thus devoid of source-indicative significance, cannot serve to distinguish the marks at issue.

Applicant's contention, however, that such an analysis improperly dissects the marks is without merit. While, as noted above, the respective marks must be compared in their entireties, it is nevertheless the case that, 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 of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in

⁴ According to the excerpt of record from The American Heritage Dictionary of the English Language (3rd ed. 1992), the term "21" is a synonym for the word "blackjack," which in pertinent part is defined as a noun meaning "3. Games. A card game in which the object is to accumulate cards with a higher count than that of the dealer but not exceeding 21. In this sense, also called *twenty-one*"

their entireties." In re National Data Corp., 753 F.3d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark" 224 USPQ at 751. Here, because the dominant and distinguishing elements of the respective marks, due to the descriptiveness of the terms "21" and "POKER," are the identical words "PLAYERS CHOICE," the marks "PLAYERS CHOICE 21" for blackjack and other game tables used exclusively in commercial gaming establishments and "PLAYERS CHOICE POKER" for poker-type card games engender, as a whole, essentially the same commercial impression.

Accordingly, we conclude that purchasers and prospective customers, familiar with registrant's "PLAYERS CHOICE POKER" mark for "poker-type card games," would be likely to believe, upon encountering applicant's substantially similar "PLAYERS CHOICE 21" mark for "casino game tables for card games of chance used exclusively in commercial gaming establishments," that such closely related goods emanate from, or are otherwise sponsored by or affiliated with, the same source. Moreover, even if such consumers were to notice the differences in the marks, in that registrant's mark relates to a poker-type product while applicant's mark refers to

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blackjack (i.e., 21) gaming tables, they would still be likely to view applicant's "PLAYERS CHOICE 21" goods as a new product line from the same source as the producers of registrant's "PLAYERS CHOICE POKER" products.

Decision: The refusal under Section 2(d) is affirmed.

T. J. Quinn

G. D. Hohein

T. E. Holtzman
Administrative Trademark
Judges,
Trademark Trial and Appeal
Board