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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Creative Consortium, Inc.

Serial No. 76263114

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Barbara A. Gold, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Hohein, Rogers, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 25, 2001,¹ Creative Consortium, Inc. (applicant) applied to register the mark ROCK PAPER SCISSORS, in typed form, on the Principal Register for goods ultimately

¹ In a paper dated June 19, 2001, applicant requested that the application's filing date be changed to May 17, 2001. There is no indication that this paper was ever considered. If there is further prosecution in this application, this paper should be addressed.

identified as "gaming equipment, namely, gaming, gambling or slot machines, with or without video output; multimedia programs and software recorded on CD-ROM, computer game programs and software for individual or network users, interactive multimedia computer game programs and software" in International Class 9.²

The examining attorney³ ultimately refused to register applicant's mark on the ground that the mark was merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), of applicant's goods. The examining attorney has submitted evidence that "Rock Paper Scissors" is a well-known game and that applicant's computer game software "could apply rules similar to those observed in the traditional game." Examining Attorney's Brief at 6. Applicant argues that "ROCK PAPER SCISSORS does not conjure up images of gaming equipment, or multimedia or computer game programs." Applicant's Brief at 9.

After the examining attorney made the refusal final, applicant appealed to this board.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics

² Serial No. 76263114 is based on an allegation of a bona fide intention to use the mark in commerce.

³ The current examining attorney was not the original examining attorney in this case.

of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). See also In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (A "mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service"). We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is descriptive. Abcor, 200 USPQ at 218.

When we analyze the evidence, we must keep in mind that the test is not whether prospective purchasers can guess what applicant's goods are after seeing applicant's mark alone. Abcor Dev., 200 USPQ at 218 ("Appellant's abstract test is deficient - not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by statute").

The examining attorney has submitted numerous printouts from NEXIS and the Internet that show that Rock

Paper Scissors is the name of a game often played by children.

The game pits symbols of rock, paper and scissors against each other: Scissors cut paper, rock smashes scissors, paper covers rock.
Great Falls Tribune, August 9, 2002.

... young daughter, waiting for the elevator on an upper floor of the headquarters hotel, were engaged in a spirited game of rock, paper, scissors. The father was a happy loser - Joe Namath.
Detroit News, January 28, 2003.

If the NBA really wanted to prove the credibility of the lottery, it would use a better system to select the order. Like rock, paper, scissors or a game of Twister between team execs.
San Diego Union-Tribune, January 12, 2003.

He was with high-school friends in Margarita Mamas, an Arena District bar. A more sophisticated game of euchre was dissolving into the child's game of rock, paper, scissors.
Columbus Dispatch, January 1, 2003.

Two new games are Arbitration, a party game that utilizes "Rock, Paper, Scissors" with personal responses to open-ended questions..
Playthings, January 1, 2003.

Games like rock, paper, scissors, banana tag and nuclear waste dump soon became part of the fun side of my brain..
Pensacola News Journal, December 24, 2002.

Remember the old children's hand game rock, paper, scissors? According to the rules of the game, paper covered rock.
Albuquerque Tribune, December 13, 2002.

Yes, it's the same game you played growing up. The game determined who got the front seat, or the last slice. And according to The Official Rules and Regulations of the WORLD RPS Society" (International Championship Edition), Rock-Paper-Scissors is a

"decision-making game of wits, speed, dexterity and strategy between players who are unable to reach a decision using other means."

Boston Globe, December 8, 2002.

One trio did "rock-paper-scissors" to determine who would take the first turn.

Columbus Ledger-Enquirer, November 24, 2002.

One highlight of camp last summer was when she won a game of rocks, paper and scissors and got to wear purple leopard pajamas.

Seattle Post-Intelligencer, November 22, 2002.

According to applicant, in "the game of Rock Paper Scissors, at least two players and usually more simultaneously display their hand in a form that is known to the players as either a rock (fist), a paper (all fingers together and extended), or a scissors (middle and index fingers extended). In the game, scissors beats paper, paper beats rock, and rock beats scissors. Thus, if two players extend their hands and one shows scissors and one shows paper, the person showing scissors wins."

Applicant's Brief at 9.

Based on this evidence, it is clear that there is a game that is recognized as "rock paper scissors." The game involves a person using his or her hand to make a symbol for a rock, paper, or scissors. Winners are determined by comparing the symbols that the participants displayed, for example, "rock covers paper." Applicant admits that its goods would follow, at least in part, rules that are

similar to the traditional game with the role of the second participant played by the game device. "It is intended that if the player enters the 'bonus round,' then the player can choose one of three symbols (rock, paper, scissors) and the machine would generate another symbol to see if the player has increased the winnings." Response dated December 23, 2002 at 4. In addition, its goods would display symbols including "a rock, a piece of paper and a scissors." Id.

Furthermore, there is evidence in the record that there are already electronic versions of the traditional "Rock Paper Scissors" game. See, e.g., <http://javascript.internet.com/games> ("Play Rock Paper Scissors against your computer. Make your selection and the computer will randomly choose as well and then the game will be scored"); and *Florida Times Union*, November 28, 2001 ("Can't decide who in the family should go mow the lawn but too lazy to play 'rock, paper, scissors'? No problem! This site provides a virtual rock, paper, scissors. The Internet amazes again. www.2street.com/rock-paper-scissors").

Applicant argues that there is multi-step reasoning process for potential customers to arrive at the conclusion that the mark is merely descriptive. We do not agree.

When we analyze whether a mark is merely descriptive, we must look at the mark in the context of the goods. Here, applicant has provided information that indicates that the mark will display symbols associated with the traditional game and that it will follow, at least in part, the rules of the traditional game. In addition, there is evidence of electronic versions of the game "Rock Paper Scissors." Under these circumstances, applicant's mark ROCK PAPER SCISSORS merely describes a feature of its gaming machines and computer game programs and software inasmuch as the mark would inform prospective customers that applicant's goods are based on the traditional game of Rock Paper Scissors.

We also address two other points of applicant. First, applicant maintains that the examining attorney argues that because "the game of Rock Paper Scissors is a game of chance, and gaming machines are games of chance, [then] the mark ROCK PAPER SCISSORS describes the goods." Applicant's Brief at 9. We do not view this as a correct summary of the examining attorney's argument inasmuch as the examining attorney based her refusal on the information applicant provided concerning its specific goods and not simply on gaming machines in the abstract. Indeed, we view the mark in the context of the goods as applicant has described

them. When we view them in this manner, applicant's mark is merely descriptive. We also point out that if an applicant's mark is descriptive of some of the goods for which it seeks registration, the mark is merely descriptive. Accord In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1791 (TTAB 2002) ("[I]f applicant's mark BONDS.COM is generic as to part of the services applicant offers under its mark, the mark is unregistrable").

When we view the mark in the context of the identified goods, the term ROCK PAPER SCISSORS will immediately inform prospective customers of the fact that applicant's gaming machines and computer game programs are based on the traditional game of Rock Paper Scissors. As such, applicant's mark would describe a significant characteristic of the goods. Therefore, we find that applicant's term is merely descriptive of the goods identified in the application.

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is affirmed.