

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed: April 30, 2012

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Xaviant, LLC

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Serial No. 77820474

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(Karen M. Strzyz, Managing Attorney).

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Before Holtzman, Lykos, and Kuczma, Administrative Trademark  
Judges.

Opinion by Lykos, Administrative Trademark Judge:

Xavian, LLC ("applicant") filed an application to register  
the mark displayed below



for, as amended, "interactive video game devices, comprised of  
software and electronic game programs, namely, game cartridges

Serial No. 77820474

and software for operating game controllers on recorded media and downloadable for delivery digitally to personal computers, video game consoles, hand held computing devices, mobile computing devices, and the global computer information network" in International Class 9, and "entertainment services, namely, providing information in the fields of production of computer game software and entertainment via the global computer information network" in International Class 41.<sup>1</sup> The description of the mark is as follows: The mark consists of a splattered "X."

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d) based on the following two registrations:

Registration No. 2867060 for the mark X in standard character format for "video game players; electronic devices for accessing global computer and communication networks, namely, computers; computer hardware and peripherals; computer mice and game controllers; computer games software; computer software for use in playing video games and for accessing and browsing global computer and communication networks; computer software for use in compressing and decompressing data and video images for video games and computer games, word text editing; computer operating system software and utilities for video games and computer games; user manuals therefor sold as a unit therewith;" in International Class 9 and

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<sup>1</sup> Application Serial No. 77820474, filed September 4, 2009, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Color is not claimed as a feature of the mark.

Serial No. 77820474

Registration No. 2693757 for the mark X in standard character format for "providing on-line chat rooms for transmission of messages among computer users concerning video and computer games; providing on-line electronic bulletin boards for transmission of messages among computer users concerning video and computer games" in International Class 38; and "entertainment services, namely, providing interactive multiplayer game services for games played over computer networks and global communications networks; providing computer games and video games downloadable over computer global communications networks; providing information on the video game and computer game industries via the Internet; and providing information on computer games, video games, video game consoles and accessories therefor via the Internet" in International Class 41.<sup>2</sup>

Subsequent to the filing of applicant's appeal brief, Registration No. 2867060 was cancelled on March 4, 2011 for failure to file a Section 8 affidavit.<sup>3</sup> In light of the cancellation of said registration, applicant in its reply brief has requested that the Class 9 goods in its involved application be divided and proceed to registration.

For the reasons discussed below, the Board denies applicant's request to divide and affirms the refusal to register as to both classes.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re*

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<sup>2</sup> Registered on March 4, 2003, Section 8 and 15 affidavits acknowledged and accepted.

<sup>3</sup> In view thereof, the Section 2(d) refusal as to Registration No. 2867060 is now moot.

Serial No. 77820474

*Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

First, we consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties as well as the relative strength or weakness of the registered mark. The question is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Jack B. Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that its applied-for mark is a "distinctive stylized design" that "creates the appearance of two crossing slashes made in a northwest-southeast direction and a northeast-southwest direction" which "present a unique connotation of slash marks not presented" in the registered mark. Applicant's Brief, p. 5. Applicant also contends that because the consumers of its and registrant's products are "sophisticated gamers who are experts in understanding various

aspects of video game play and information" (Applicant's Brief, p. 5), they will understand the distinction between applicant's "splattered design consisting to two cross slashes" and registrant's letter "X." In support thereof, applicant made of record Internet screenshots of software game titles that include the letter "X" as the dominant portion of their title (for example, *X-Blade*, *XBOX*, *Outpost Kaloki X*, *Daniel X*, *Soldner-X 2*, *X3 Gold*, and *Dragon Quest X*).

Applicant's arguments are unconvincing. Applicant's and registrant's marks are legally identical. Contrary to applicant's assertions, applicant's mark consists of the stylized depiction of the letter "X." Indeed, this is confirmed in the record by applicant's own description of the mark as "a splattered 'X.'" Registrant's mark is the letter "X" in standard character format. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display. See Trademark Rule 2.52(a). As such, registrant has the right to use the letter "X" to identify its goods and services in any type of stylization, including a manner of display identical to that of applicant's mark. Thus, applicant cannot avoid a likelihood of confusion by depicting its letter "X" mark in a stylized format. See, e.g., *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir.

Serial No. 77820474

1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular display"); *In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988).

Regarding applicant's argument that its prospective consumers are sophisticated and able to discern the differences in third-party use of "X" marks, we assume that applicant is relying on the *du Pont* factor of the relative strength/weakness of registrant's mark. Applicant's evidence of third-party use is not sufficient to show that the mark is so commonly used that consumers may be able to distinguish marks incorporating "X" based on slight differences between them.

In addition, all of the third-party uses consist of the letter "X" combined with other material; none consist solely of the letter "X." This diminishes the probative value of this evidence. Furthermore, even if we were to assume that registrant's mark is weak, even weak marks are entitled to protection against registration of a confusingly similar mark. *See Giant Food Inc. v. Rosso and Mastracco, Inc.*, 218 USPQ 521 (TTAB 1982).

In addition to being legally identical in appearance, prospective consumers will pronounce both applicant's and registrant's marks in the same manner - as the letter "X." It

Serial No. 77820474

is well established that similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007). We therefore conclude that the first *du Pont* factor weighs in favor of finding a likelihood of confusion.

Next, we consider the goods and services as well as the channels of trade. At the outset, we note that the goods and services in question are not identical. However, it is not necessary that the goods or services be identical or even competitive in nature in order to support a finding of likelihood of confusion, it being sufficient that the goods or services 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 circumstances that would give rise, because of the marks employed thereon, to the mistaken belief that they originate from or are in some way associated with the same producer. *In re Home Builders Assn. of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990).

As noted above, applicant has now requested division of the Class 9 goods to proceed to registration. Essentially, applicant contends that because of the cancellation of the registration for the Class 9 goods, the examining attorney's

Serial No. 77820474

refusal as to that Class is now moot. We disagree. As the record evidence shows, applicant's "interactive video game devices, comprised of software and electronic game programs, namely, game cartridges and software for operating game controllers on recorded media and downloadable for delivery digitally to personal computers, video game consoles, hand held computing devices, mobile computing devices, and the global computer information network" are indeed related to registrant's Class 38 and 42 services, and specifically the provision of "computer games and video games downloadable over computer global communications networks." Within the computer game software and online computer game industry, such goods and services are often identical in content. To show the relatedness of such goods and services in the computer gaming field, the examining attorney has submitted copies of use-based third-party registrations, as follows:

Registration No. 3128122 for the mark RYGAR for "computer game and video game and discs; computer game software and video game software; mobile communication device software for use in accessing and playing computer and video games via wireless medium; downloadable computer programs for playing computer games and video games via global computer and communication networks; computer and video game programs for use with mobile communication devices" in International Class 9 and "providing wireless games that may be accessed network-wide by network users; entertainment services namely providing mobile communication-based wireless games" in International Class 41;

Serial No. 77820474

Registration No. 3720041 for the mark BUZZ for "computer hardware; computer and video game apparatus, namely, joysticks, control pads, handheld interactive controllers; computer and video game tapes and cassettes; computer and video game programs[sic]; computer peripherals; compact discs, video discs, DVD's; audio and video recordings featuring computer and video game excerpts and content" in International Class 9 and "entertainment services, namely, providing online computer games in International Class 41;

Registration No. 3541738 for the mark BLACKJACK BOWLING for "computer game software and video game cartridges, downloadable game software for play via computers and wireless devices; gaming apparatus, namely, gaming machines" in international class 9 and entertainment services, namely, providing on-line interactive computer games" in International Class 41;

U.S. Registration No. 3613451 for the mark CAFE.COM GOTCHA! and design for "entertainment software, namely, software used for providing multi-player access to on-line game environments; computer game software; video game software; video game programs; video game cartridges; electronic game software; electronic game software for use on consoles; electronic game programs; electronic game cartridges, downloadable electronic games via the internet and wireless devices; computer programs for developing other computer programs and computer programs for assisting developers in creating program code for use in multiple application programs" in International Class 9 and "entertainment services, namely, providing on-line computer games by means of communications networks; arranging and conducting of competitions for on-line computer game players" in International Class 41; and

Registration No. 3033182 for the mark CHAINS OF PROMATHIA for "computer game software; video game software" in International Class 9 and "providing on-line computer games and/or on-line video games; providing information on computer game strategies and/or video game strategies via computer networks and/or global communication networks" in International Class 41.

Third-party registrations have probative value to the extent that they may serve to suggest that the goods are of a type

Serial No. 77820474

which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

In addition, the examining attorney submitted Internet evidence showing third parties offering for sale computer and video games in both software and online downloadable form on the same websites under the same marks. See excerpts from *Take-Two Interactive*, <http://ir.take2games.com/phoenix.zhtml?c=86428&p=irol-irhome> and *EA Sports*, <http://aboutus.ea.com/home.action>, Denial of Request for Reconsideration dated November 2, 2010. We find that this evidence further supports the relatedness of applicant's computer and video game software and registrant's online downloadable computer and video games.

As to applicant's services identified as "entertainment services, namely, providing information in the fields of production of computer game software and entertainment via the global computer information network" in Class 41, such services are encompassed by registrant's more broadly identified and unrestricted provision of "information on the video game and computer game industries via the Internet" and provision of "information on computer games, video games, video game consoles and accessories therefor via the Internet" in Class 41, such that they are legally identical. Moreover, because the services are legally identical and unrestricted, they are

Serial No. 77820474

presumed to move in the same channels of trade and to be sold to the same classes of consumers. See *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). See also *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). For these reasons, we find that the second and third *du Pont* factors also weigh in favor of finding a likelihood of confusion.

We now turn to the *du Pont* factor regarding sophistication of the purchasers. Applicant argues that because the prospective consumers of its goods and services are sophisticated gamers, they are unlikely to be confused into thinking that applicant's products and services originate from or are affiliated with registrant. In support thereof, applicant points to evidence of "over sixty screenshots of software games that include the letter X as the dominant[sic] portion of the software title." Applicant's Brief, p. 8. Applicant maintains that this evidence is probative because it shows that "gaming consumers are able to distinguish software

titles with dominate X wording from other software titles and gaming platforms which also include dominant X wording."

Applicant's reliance on this evidence to show the sophistication of prospective consumers is misplaced. As previously discussed above, this evidence relates more to the *du Pont* factor regarding the relative strength/weakness of registrant's mark. Thus, we do not find this evidence to be of probative value in demonstrating the sophistication of prospective purchasers of applicant's goods and services. Applicant's Internet evidence merely shows the existence of third-party uses of marks identifying software incorporating the letter "X." None of the evidence describes or refers to the nature of the consumer, and the consumer's ability to discern the origin of each product.

Inasmuch as the applicant's and registrant's identified goods and services are not restricted to purchase by experts or any particular class of consumers in the computer software and gaming industry, we must assume the respective goods and services would reach all the usual classes of consumers, which in this case would include ordinary consumers. Such a consumer is likely to exercise only ordinary care in making purchasing decisions.

In any event, even if the only consumers are sophisticated gamers, the fact that they are sophisticated or knowledgeable in

a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. See *In re Cynosure, Inc.*, 90 USPQ2d 1644 (TTAB 2009). With essentially identical marks and related goods and services, even a careful, sophisticated consumer of such goods is not likely to understand that the goods emanate from different sources, particularly where, as here, there is evidence that both types of goods may emanate from a single source under a single mark. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000). Accordingly, the fourth *du Pont* factor weighs in favor of finding a likelihood of confusion.

Considering all of the evidence of record, we conclude that the marks are legally identical; applicant's goods are highly related to registrant's services; and applicant's services, as identified, are legally equivalent to registrant's services such that they must be presumed to be sold through the same channels of trade to the same classes of purchasers. To the extent that there are any other relevant *du Pont* factors, we treat them as neutral. Weighing all of the relevant factors, we find a likelihood of confusion between applicant's mark and the cited registration.

**Decision:** Applicant's request to divide is denied; the refusal to register pursuant to Section 2(d) is affirmed.