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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Vero Vysosias*

Serial No. 85309258

Vero Vysosias, *pro se*.

Anthony Rinker, Trademark Examining Attorney, Law Office 102 (Mitch Front, Managing Attorney).

Before Quinn, Lykos, and Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant has applied to register the mark shown below, as amended:<sup>1</sup>



<sup>1</sup> Application Serial No. 85309258, filed May 1, 2011, alleging first use and first use in commerce at least as early as January 4, 2011. The mark was amended during prosecution to add the top-level domain name “.com.” See Trademark Rule 2.72(a), 37 C.F.R. § 2.72(a). See also Trademark Manual of Examining Procedure (“TMEP”) § 1215.08(a) “Adding or Deleting TLDs in Domain Name Marks” (October 2013).

Applicant originally identified his services as “entertainment in the nature of basketball games,” in International Class 41.

Registration has been refused on the ground of a likelihood of confusion pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with the following mark:



registered for “entertainment in the nature of circleball games,”<sup>2</sup> with “CIRCLEBALL” disclaimed, and for applicant’s failure to comply with the examining attorney’s requirement for an acceptable recitation of services. Applicant made three requests to amend his original identification of services – “entertainment in the nature of basketball games” – after registration was refused pursuant to Section 2(d), stating that each such request was intended to “override likelihood of confusion.”<sup>3</sup> The examining attorney asks not only that we affirm the Section 2(d) refusal but also that we affirm his final refusal “to accept applicant’s various proposed amendments to the identification of services.” After both refusals to register were made final, applicant timely appealed. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief.

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<sup>2</sup> Registration No. 3648041, issued June 30, 2009.

<sup>3</sup> December 24, 2011 response to Office action at 8; July 5, 2012 response to Office action at 14; January 2, 2013 response to Office action at 13.

An analysis of likelihood of confusion under Trademark Act Section 2(d) includes a comparison of the goods or services in the refused application and cited registration. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Therefore, it is necessary to consider first applicant's identification of his services. *In re Paper Doll Promotions Inc.*, 84 USPQ2d 1660, 1662 (TTAB 2007).

#### Identification of Services

Section 7(c) of the Trademark Act provides, in relevant part, “[c]ontingent on the registration of a mark on the principal register provided by this Act, the filing of the application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration . . . .” Thus, the identification of goods or services in an application for registration on the Principal Register defines the scope of the rights established by filing the application. *See Grand Canyon West Ranch, LLC v. Hualapai Tribe*, 88 USPQ2d 1501, 1509 (TTAB 2008); *In re Swen Sonic Corp.*, 21 USPQ2d 1794, 1795 (TTAB 1991).

The application was filed under Section 1(a) of the Trademark Act, which states that, among other requirements, an application “shall include specification of . . . the goods in connection with which the mark is used.” 15 U.S.C. § 1051(a)(2). Trademark Rule 2.32(a)(6), 37 C.F.R. § 2.32(a)(6), requires that an application include “a list of the particular goods or services on or in connection with which the applicant uses or intends to use the mark.” The identification of goods or services must be specific, definite, clear, accurate, and concise. *See In re Petroglyph Games*

*Inc.*, 91 USPQ2d 1332, 1335 (TTAB 2009). As stated in the Trademark Manual of Examining Procedure: “The identification should set forth common names, using terminology that is generally understood. For products or services that do not have common names, the applicant should use clear and succinct language to describe or explain the item. Technical or esoteric language and lengthy descriptions of characteristics or uses are not appropriate.” TMEP § 1402.01.

Applicant submitted three separate amendments to the identification of services, each of which was considered and rejected by the examining attorney. Following is a summary of applicant’s proposed amendments and the grounds for the examining attorney’s refusal to accept them:

1. On December 24, 2011, applicant filed his first amendment to the recitation of services to “Entertainment in the nature of Circball games or athletic equipment, namely, Circball.”<sup>4</sup> The examining attorney did not accept this amendment “because it refers to goods and/or services that are not within the scope of the identification that was set forth in the application at the time of filing” per Trademark Rule 2.71(a).<sup>5</sup> The examining attorney stated that athletic equipment is a good, not a service, which falls in International Class 28 and cannot be added to an application for Class 41 entertainment services. Moreover, “[c]ircle

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<sup>4</sup> December 24, 2011 response to Office action.

<sup>5</sup> January 13, 2012 Office action. Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a), states: “The applicant may amend the application to clarify or limit, but not to broaden, the identification of goods and/or services.”

ball games and basketball games are highly related, but are not the same games, so this would change the type of entertainment services.”<sup>6</sup>

2. On July 5, 2012, applicant submitted his second amendment consisting of “Entertainment in the nature of a patented sport known as Circonic Game.”<sup>7</sup> The examining attorney again did not accept this amendment “because it refers to goods and/or services that are not within the scope of the identification that was set forth in the application at the time of filing.”<sup>8</sup> Pointing out that “Circonic” Game is not common commercial language, the examining attorney stated that applicant must identify the services with the common commercial name for the game, and also must delete the patent claim.<sup>9</sup> *Cf. Camloc Fastener Corp. v. Grant*, 119 USPQ 264, 265 n.1 (TTAB 1958) (noting that registered mark must be deleted from identification of goods).

3. On January 2, 2013, applicant submitted his last amendment of “Entertainment in the nature of circball.com.”<sup>10</sup> In response to the third proposed amendment, the examining attorney issued a final Office action on January 25, 2013, stating in part:

The proposed amendment to the identification cannot be accepted because it refers to indefinite services that are not within the scope of the

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<sup>6</sup> January 13, 2012 Office action.

<sup>7</sup> July 5, 2012 response to Office action.

<sup>8</sup> July 25, 2012 Office action.

<sup>9</sup> *Id.*

<sup>10</sup> January 2, 2013 response to Office action.

identification that was set forth in the application at the time of filing. *See* TMEP §1402.01.

Applicant must amend this wording to specify the common commercial or generic name for the services. If there is no common commercial or generic name for the services, then applicant must describe the nature of the services as well as their main purpose, channels of trade, and the intended consumer(s).

The amendment identifies the following services: **“Entertainment in the nature of circball.com.”** This wording is indefinite and vague; circball.com is not a generic identification of any kind of entertainment service. Finally, applicant is again merely trying to modify the services to obviate the similarity for the likelihood of confusion refusal above.

Identifications can be amended only to clarify or limit the goods and/or services; adding to or broadening the scope of the goods and/or services is not permitted. *Id.*; see TMEP §§1402.06 et seq., 1402.07. Therefore, this wording should be deleted from the identification, and the original, definite and acceptable identification of services submitted when the application was filed must be used;

International Class 041: Entertainment in the nature **of basketball games**.

Applicant’s final requested amendment – “Entertainment in the nature of circball.com” – is the only identification he pursued during briefing and thus preserved for appeal.<sup>11</sup> *See* Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1203.02(g) (3d ed. rev. 2 June 2013) (“If an applicant, in its appeal brief, does not assert a claim made during prosecution, it may be deemed waived by the Board.”).

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<sup>11</sup> Appeal Brief at 16-17.

The USPTO has discretion to require the degree of particularity deemed necessary to clearly identify the services covered by the mark. *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007). We find the term “circball.com” to be indefinite per se because it identifies an Internet domain name rather than the common commercial name of an entertainment service or game. Therefore, this final proposal by applicant fails to satisfy the requirement of Trademark Rules 2.71(a) and 2.32(a)(6) for an acceptable identification.<sup>12</sup> *See In re Swen Sonic Corp.*, 21 USPQ2d at 1796 (affirming refusal to accept amended identification of goods).<sup>13</sup>

Because we affirm the refusal to accept applicant’s proposed amendments, we will use his original identification of services and that required by the examining attorney – “entertainment in the nature of basketball games” – in our analysis of the 2(d) refusal.

### Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or

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<sup>12</sup> Had applicant preserved for review on appeal the two earlier proposed IDs, we would find them unacceptable for the reasons provided by the Trademark Examining Attorney in his appeal brief.

<sup>13</sup> We also note that a requirement for an acceptable identification is reviewable by either appeal to the Board or petition to the Director of the U.S. Patent and Trademark Office pursuant to Trademark Rules 2.63(b) and 2.146(a), 37 C.F.R. §§ 2.63(b) and 2.146(a). *In re Stenographic Machines, Inc.*, 199 USPQ 313, 315-16 (Comm’r 1978); *see also In re Faucher Indus. Inc.*, 107 USPQ2d 1355, 1357-58 (TTAB 2013) (reviewing applicant’s options for resolving issues concerning identifications).

services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“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.”); *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217 (TTAB 2001) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services.”). We consider each of the *du Pont* factors as to which applicant or the examining attorney submitted evidence.

A. Similarity of the Marks

We first consider the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056,



224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, 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 the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 224 USPQ at 751. Slight differences in marks do not normally create dissimilar marks. *See, e.g., In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985); *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445-46 (TTAB 1977).

Applicant’s mark and the cited registered mark are both composites:



For marks consisting of words and a design, the words are normally given greater weight because they would be used by consumers to request the goods or services. *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). The literal components of the marks are “circball.com” and “C CircleBall,” respectively; however, we tend to view the shape circumscribing the latter mark more as a design element than as the letter “C.” The suffix “.com” refers to a commercial Internet domain, and thus has

no source-identifying significance. *See In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009).

We find the terms *circball.com* and *C CircleBall* to be visually and aurally similar. Although applicant argues that he derived the first syllable of the literal portion of his mark from the word “circus,”<sup>14</sup> consumers would be unlikely to call this word to mind because of the other elements of applicant’s mark, i.e., the generally circular shape of the mark and the image of a round ball, and consumers instead may assume that “circ” is an abbreviation of the word “circle” or a similar term. Considering that “circ” and “circle,” respectively, are followed by the identical term “ball,” we find the wording to be similar in meaning as well.

The design elements of the marks also are similar and serve to heighten the similarity in their wording. Applicant describes his mark as follows: “The mark consists of the word ‘circball.com’ with curved lines forming a curvature of a ball.” The cited registered mark is described as follows: “The mark consists of a ‘C’ circling a ball with the word ‘CircleBall’ in the middle.” Thus, both marks are round and incorporate prominent design elements representing balls. The lining on each ball, furthermore, suggests a basketball.

In view of the similarities in the literal and design components of these two marks, we find that the marks as a whole make similar overall commercial impressions. The first *du Pont* factor therefore favors a likelihood of confusion.

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<sup>14</sup> Appeal Brief at 8.

B. Similarity of the Services

We turn next to the similarity of the services, the second *du Pont* factor. The services need not be identical or even competitive in order to support a finding of a likelihood of confusion. Rather, it is enough that the services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the respective services. *See In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978).

Our analysis of the second *du Pont* factor must be based on the services as they are recited in the application and the cited registration, respectively, not on extrinsic evidence of actual use. *See, e.g., Coach Servs., Inc.*, 101 USPQ2d 1713, 1722; *Octocom Sys., Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). For purposes of our consideration of the Section 2(d) refusal, we use applicant's original identification: "entertainment in the nature of basketball games."

Applicant contends that he is the sole proprietor of "an entirely new invented sport," which he has patented as "CIRCONIC GAME."<sup>15</sup> One method of play of his

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<sup>15</sup> Appeal Brief at 7, 9.

game, among others, is to give the ball voluntarily to the opponent.<sup>16</sup> Excerpts from the rules and regulations for “CircBall Game,” made of record by the examining attorney, indicate that applicant’s game is played on a circular court using a “bunch of baskets in tandem.”<sup>17</sup> One section of the rules addresses “morality play,” which is “the giving of the ball from the hands of a charitable player in the care and share love zones for the opponent (beneficiary) player to make a field goal.”<sup>18</sup>

Applicant vigorously distinguishes his services from basketball, arguing that:

the nature of service is NOT in the [sic] entertainment in the nature of basketball. The applicant did not invent this game simply to play basketball, nor is it a game of basketball nor about basketball. This game is about the patented invention Circonic Game, otherwise known as Circball.<sup>19</sup>

However, applicant’s page on Facebook.com characterizes CircBall as “an alternative indoor or outdoor basketball game,”<sup>20</sup> and a brochure submitted as another of applicant’s specimens states that “CircBall™ is a unique game of skill for indoor or outdoor basketball sports.”<sup>21</sup> The record thus reflects that applicant’s game is a variation on basketball. Moreover, we are unable on appeal to craft a recital of services that might better describe applicant’s game. We reiterate that we must compare the services as recited in the cited registration with applicant’s only acceptable identification.

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<sup>16</sup> *Id.* at 9.

<sup>17</sup> August 17, 2011 Office action at 2, 6.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> Appeal Brief at 17. Applicant provided two patent numbers, but the underlying patents are not of record.

<sup>20</sup> July 5, 2012 response to Office action at 12, 15.

<sup>21</sup> *Id.* at 13, 17.

Turning to the cited registration, the identified services are “entertainment in the nature of circleball games.” Neither the examining attorney nor applicant made of record any evidence regarding the nature of these services. The term “circleball” is not found in the U.S. Acceptable Identification of Goods and Services Manual (ID Manual); nor did the term appear in searches of several dictionaries and encyclopedias, of which we could have taken judicial notice.<sup>22</sup>

Applicant, however, made several statements during prosecution and briefing indicating that he believed the services identified in the cited registration are a variation on basketball, including the following:

- “. . . the registrant’s mark connotes a service involving rules or method of play exactly the same as the rules of basketball.”<sup>23</sup>
- “. . . Registrant’s service mark connotes a method of play wherein scoring points are exactly the same as basketball (i.e., same 2point Field Goal, 3point Ring Goal, 1point free throw) . . . .”<sup>24</sup>
- “Registrant’s mark connotes a service whose method of play exactly resembles basketball, despite its use of a variant hoop and a ball.”<sup>25</sup>
- “C CIRCLEBALL is actually more like basketball than CIRCBALL.COM in its method of play because C CIRCLEBALL uses the same exact rules as basketball, whereas CIRCBALL.COM does not. It has its own patented rules. Rules and methods of play for each of these different games can be read at their websites (www.circleball.com and www.circball.com).”<sup>26</sup>

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<sup>22</sup> We do not *sua sponte* review the specimen of use for the cited registration. There are numerous cases in which the Board has refused to take judicial notice of records residing in the Patent and Trademark Office, including the file histories of registrations cited in ex parte proceedings. *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1583 (TTAB 2013).

<sup>23</sup> July 5, 2012 response to Office action at 11.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> Appeal Brief at 10.

<sup>26</sup> *Id.* at 10-11.

None of applicant's arguments are supported by record evidence. For example, applicant referenced information from registrant's website, but he did not make the underlying website content of record.<sup>27</sup>

Nonetheless, we construe applicant's statements quoted above as admissions that the services identified in the cited registration are similar or related to "entertainment in the nature of basketball games," applicant's original services identification. Indeed, applicant repeatedly attempted to amend his original recital specifically to "override likelihood of confusion" with the cited registration, reflecting applicant's recognition that the "circleball games" in the registration are similar or related to basketball.

Based on the record evidence relating to applicant's services and applicant's admissions regarding registrant's services, we find that the entertainment services identified in the application and the cited registration are both variations on basketball and therefore are similar or related. The second *du Pont* factor also weighs in favor of a likelihood of confusion.

C. Conclusion as to Likelihood of Confusion

To the extent that any other *du Pont* factors for which no evidence was presented may nonetheless be applicable, we treat them as neutral. In view of our findings that applicant's mark is similar in sound, appearance, and commercial impression to the cited registered mark and that the identified services are similar

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<sup>27</sup> See, e.g., Appeal Brief at 10-11. We also note that, even had the underlying evidence been made of record, the news story transcript and survey submitted for the first time with applicant's reply brief were untimely and have been given no consideration. See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); TBMP §§ 1203.02(e), 1207.01.

or related, we find that applicant's mark is likely to cause confusion with the cited registered mark. To the extent there are any doubts, we resolve them, as we must, against applicant as the newcomer and in favor of the registrant. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1202 (TTAB 2007); *Hard Rock Café Int'l (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1514 (TTAB 2000).

Use in Commerce of Applicant's Mark

We raise one final issue not addressed by the examining attorney during prosecution. The application was filed pursuant to Section 1(a) of the Trademark Act, on the basis that applicant's mark was in use in commerce. "Commerce" is defined in Trademark Act Section 45, 15 U.S.C. § 1127, as "all commerce which may lawfully be regulated by Congress." A service mark is deemed to be in use in commerce "when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services." *Id.*

The record, including applicant's specimens of use, raises a question as to whether applicant's services had been rendered in the United States as of either his alleged date of first use in commerce of January 4, 2011 or May 1, 2011, the date his application was filed.<sup>28</sup> Should applicant ultimately prevail, he may need to amend

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<sup>28</sup> The only specimen of record with a date before the application filing date of May 1, 2011 indicates that applicant's services were rendered on April 12, 2011 in Caloocan City, which is in the Philippines. *Encyclopaedia Britannica Online Academic Edition* (accessed January 10, 2014, [britannica.com/EBchecked/topic/90131/Caloocan](http://britannica.com/EBchecked/topic/90131/Caloocan)). The Board may take judicial notice of information from encyclopedias, including online encyclopedias which exist in printed format or have regular fixed editions. See *Productos Lacteos Tocumbo S.A. de*

either the first use date or the basis of his application if his services had not been rendered in commerce, as defined in the Trademark Act, as of those dates. *See In re W.W. Henry Co.*, 82 USPQ2d 1213, 1213-14, 1216 (TTAB 2007) (reversing refusal to register under Section 2(d), noting that applicant filed its application under Section 1(a) but alleged a first use date after the application filing date, and remanding to the examining attorney “to allow the applicant time to file either an amendment to the application to allege dates of first no later than the filing date of the application or an amendment to assert Section 1(b) of the Trademark Act as the basis for the application.”).

*Decision:* The examining attorney’s requirement for an acceptable identification and refusal to register applicant’s mark under Section 2(d) of the Trademark Act are affirmed.

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*C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 n.61 (TTAB 2011); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006); *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).